No. 15357

United States Court of Appeals

for the Ninth Circuit

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-18-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

LOUIS M. BROWN,
EDWARD SANDERS,
6399 Wilshire Blvd.,
Los Angeles 48, Calif.,

For Petitioners.

CHARLES K. RICE,
Asst. U. S. Atty. General,
Tax Div., Dept. of Justice;

LEE A. JACKSON,
Atty. Dept. of Justice,
Department of Justice,
Washington 25, D. C.,

For Respondent.

The Tax Court of the United States

Docket No. 51365

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols ANC-Ap-SF, LA: 90D:CTF) dated September 9, 1953, and as a basis of their proceeding allege as follows:

1. The petitioners are individuals, husband and wife, with their place of residence at 14 Flood Circle, Atherton, California. The returns for the petitioners here involved were filed with the Collector for the First District of California at San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioners on September 9, 1953.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar years 1948 and 1949, and is in the amounts of $6,866.59 and $3,947.58, respectively, of which $2,680.30 for

1948 and $3,481.04 for 1949, a total of $6,161.34, is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The Commissioner erred in determining that alimony payments by the taxpayer of $5,292.60 in 1948 and $7,867.44 in 1949 are not deductible under Internal Revenue Code Section 23(u).

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

On March 6, 1946, petitioner Hans. S. Hollander entered into a property settlement agreement with his wife, Idy Hollander. Under the terms of this agreement, petitioner Hans S. Hollander was obligated to make payments to Idy Hollander for her support, care and maintenance until her death or remarriage. The 1946 property settlement agreement was incorporated in a decree of divorce granted by a Nevada court on June 12, 1946. Petitioner Hans S. Hollander complied with the provisions of said agreement at all times.

On March 16, 1948, the 1946 property settlement agreement was revised and modified with the consent of both parties. The 1948 modification obligated petitioner Hans S. Hollander to pay a different maximum amount of alimony annually for six years to his former wife, Idy Hollander. This obligation to pay alimony was to cease at the death

of Idy Hollander, and alimony payments made by petitioner in any year could not exceed 40% of his net income for that year. In any year where the latter limitation caused the amount of alimony paid to fall below the maximum amount of alimony due, the difference between the maximum amount of alimony due and the amount of alimony in fact paid was to be paid in later years. Moreover, payments in any later year also could not exceed 40% of petitioner's net income for that year. Thus, petitioner's obligation could extend over an indeterminate future period. Except for the specific changes made by the 1948 modification of agreement, all provisions of 1946 agreement remained in effect.

Payments by petitioner Hans S. Hollander under the 1948 agreement were payments in discharge of a legal obligation imposed by an instrument which was incident to both the original divorce decree and to the divorce itself. By merely modifying and revising the 1946 agreement, which had been incorporated in the original decree of divorce, the 1948 agreement was incident to both the original divorce decree and the divorce itself. Moreover, on June 30, 1948, the 1948 agreement was incorporated in a decree of a California Superior Court establishing the Nevada decree as a valid foreign judgment and ordering petitioner Hans S. Hollander to comply with its terms.

The payments made under the 1948 agreement

were periodic payments within the meaning of Internal Revenue Code Section 22(k).

No obligation the principal sum of which is specified exists in the 1948 agreement. The payments are to stop at the death of Idy Hollander and cannot exceed 40% of petitioner Hans S. Hollander's net income for any given year. Upon the death of petitioner Hans S. Hollander before February 1, 1951, his estate would be liable only for the maximum monthly payments falling due under the 1948 agreement between the date of his death and February 1, 1951. His estate would not be liable for the amount by which the maximum annual amount of alimony due exceeded 40% of his net income in years prior to his death. The existence of these contingencies makes the calculation of any specific principal sum impossible.

The 1948 agreement also provides that if in any given year a difference exists between the maximum amount of alimony and 40% of petitioner Hans S. Hollander's net income, such difference must be paid in later years. Since payments in any later year also may not exceed 40% of petitioner Hans S. Hollander's income for such year, petitioner Hans S. Hollander may be required to make payments for a period in excess of 10 years from the date of the 1948 agreement. This latter fact alone is enough to characterize the payments as periodic.

Wherefore, petitioners pray that this Court may hear the proceeding and redetermine the liability

therein complained of; that it determine that there is a deficiency due from the petitioners for years 1948 and 1949 which is not in excess of $4,652.83; and that the Court may grant such other and further relief as the nature of the case may warrant.

/s/ LAWRENCE E. IRELL,
Counsel for Petitioners.

Duly verified.

EXHIBIT A

1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

Sep. 9, 1953

ARC-Ap:SF
LA:90D:CTF

Mr. Hans S. Hollander and
Mrs. Clemence Blum Hollander
Husband and Wife
25 West Clay Park
San Francisco 21, California

Dear Mr. and Mrs. Hollander:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, and December 31, 1949, discloses a deficiency of $10,814.17, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue.

By /s/ W. T. TIGNOR,
Associate Chief, Appellate Division.

CTForcum:vmc
Enclosures:
Statement
Form 1276
Agreement Form

Statement

ARC-Ap:SF
LA:90D:CTF

Mr. Hans S. Hollander and Mrs. Clemence Blum Hollander
Husband and Wife
25 West Clay Park, San Francisco 21, California

Tax Liability for the Taxable Years Ended December 31, 1948 and 1949

Year		Deficiency
1948	Income tax	$ 6,866.59
1949	Income tax	3,947.58
	Total	$10,814.17

In making this determination of your income tax liability careful consideration has been given to the reports of examination dated March 28, 1950, and November 6, 1951, to your protests dated August 15, 1950, and January 3, 1952, and to the statements made at the conference held on April 29, 1953.

In your returns for the taxable years 1948 and 1949 there are claimed deductions in the respective amounts of $9,000.00 and $7,867.44 for alimony paid. It has been determined under Section 23(u) of the Internal Revenue Code that a deduction of $3,707.40 is allowable for 1948 and that no deduction is allowable for 1949. Accordingly, the deductions claimed are disallowed to the extent of $5,292.60 for 1948 and $7,867.44 for 1949.

A copy of this letter and statement has been mailed to your representative, Mr. Lawrence E. Irell, c/o Irell & Manella, 810

Roosevelt Building, Los Angeles 17, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income
Taxable Year Ended December 31, 1948

Net income as disclosed by return	$74,872.37
Unallowable deductions and additional income:	
(a) Alimony deduction disallowed	5,292.60
(b) Net gain from the sale or exchange of capital assets increased	6,750.00
(c) Travel and entertainment expense disallowed	1,658.00
Net income adjusted	$88,572.97

Explanation of Adjustments

(a) This adjustment has been previously explained herein.

(b) The net gain from the sale of capital assets reported in your return in the amount of $32,091.03 is increased in the amount of $6,750.00 due to the following adjustments:

(1) Capital loss carry-over disallowed	$ 6,250.00
(2) Loss from sale of 500 shares of Blum's preferred decreased	500.00
Total	$ 6,750.00

(1) It has been determined that the capital loss carry-over claimed in the amount of $6,250.00 is unallowable, inasmuch as such loss resulted from the sale of a personal residence, and is not allowable under the provisions of the Internal Revenue Code.

(2) It has been determined that the cost or basis of 500 shares of Blum's preferred stock was $9,000.00 instead of $10,000.00, as shown in your return, or a decrease of $1,000.00. The loss claimed is a long-term capital loss and the adjustment is, therefore, 50% of $1,000.00, or $500.00.

(c) Travel and entertainment expense claimed as a deduction in your return in the amount of $4,975.00 is disallowed to the extent of $1,658.00 due to lack of substantiation that such disallowed amount represents an allowable deduction under the provisions of the Internal Revenue Code.

Computation of Alternative Tax
Taxable Year Ended December 31, 1948

Net income adjusted		$88,572.97
Less: Excess of net long-term capital gain over net short-term capital loss		38,841.03
Ordinary net income		$49,731.94
Less: Exemptions		3,000.00
Balance subject to tax		$46,731.94
One-half of $46,731.94		23,365.97
Tentative tax	$ 9,185.92	
Less reduction under Sec. 12(c), I.R.C.	1,122.31	
Partial tax on one-half of net income		$ 8,063.61
Combined partial tax ($8,063.61 x 2)		$16,127.22
Plus: 50 per cent of $38,841.03		19,420.51
Combined alternative tax		$35,547.73

Computation of Tax
Taxable Year Ended December 31, 1948

Net income adjusted		$88,572.97
Less: Exemptions		3,000.00
Balance, subject to tax		$85,572.97
One-half of $85,572.97		42,786.48
Tentative tax	$21,662.67	
Less reduction under Sec. 12(c), I.R.C.	2,619.52	
Total tax on one-half of net income		$19,043.15
Combined tax ($19,043.15 x 2)		38,086.30
Combined alternative tax		35,547.73
Correct income tax liability		35,547.73
Income tax liability shown on return, account No. 3198759		28,681.14
Deficiency of income tax		$ 6,866.59

Adjustments to Net Income
Taxable Year Ended December 31, 1949

Net income as disclosed by return	$32,305.48
Unallowable deductions:	
(a) Alimony deduction disallowed	7,867.44
(b) Travel and entertainment expense disallowed	1,128.00
Net income adjusted	$41,300.92

Explanation of Adjustments

(a) This adjustment has been previously explained herein.

(b) Travel and entertainment expenses claimed as a deduction in your return are disallowed to the extent shown below due to lack of substantiation that such disallowed amounts represent allowable deductions under the provisions of the Internal Revenue Code:

	Claimed	Allowed	Disallowed
Travel and entertainment expense required in earning salaries	$3,685.00	$2,457.00	$1,228.00
Automobile expenses	1,200.00	900.00	300.00
Total			$1,528.00
Additional expense allowed for trip to Europe	$3,476.00	$3,876.00	$ 400.00
Net amount of travel and entertainment expense disallowed			$1,128.00

Computation of Tax
Taxable Year Ended December 31, 1949

Net income adjusted	$41,300.92
Less: Exemptions	3,000.00
Balance subject to tax	$38,300.92
One-half of $38,300.92	19,150.46
Tentative tax	$ 6,809.74
Less reduction under Sec. 12(c), I.R.C.	837.17
Total tax on one-half of net income	$ 5,972.57

Combined tax ($5,972.57 x 2)	$11,945.14
Correct income tax liability	$11,945.14
Income tax liability shown on return, account No. 3195574	7,997.56
Deficiency of income tax	$ 3,947.58

Received and filed November 30, 1953, T.C.U.S.

Served December 1, 1953.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the deficiencies determined by the respondent are in income taxes for the calendar years 1948 and 1949 in the amounts of $6,866.59 and $3,947.58, respectively. Denies the remaining allegations of paragraph 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition.

5. Admits that on March 6, 1946, petitioner Hans S. Hollander entered into an agreement entitled "property settlement agreement" with his

wife Idy Hollander; that under the terms of this agreement petitioner Hans S. Hollander was obligated to make payments to Idy Hollander for alimony, care and maintenance until her death or remarriage; that this agreement was incorporated in a decree of divorce granted by a Nevada court on June 12, 1946; that petitioner Hans S. Hollander complied with the provisions of said agreement; and that on March 16, 1948, the parties entered into a second agreement under which petitioner Hans S. Hollander was obligated to pay a different maximum amount annually for six years to his former wife, Idy Hollander. Denies the remaining allegations of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ DANIEL A. TAYLOR, R.E.M.
Chief Counsel, Internal
Revenue Service.

Filed January 26, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-

entitled taxpayers, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

I.

Taxpayers, from and after August 5, 1948, were husband and wife. The taxpayers filed their Federal Income Tax Returns for the calendar years 1948 and 1949 with the Collector of Internal Revenue for the First District of California. The Returns were filed on the cash receipts and disbursements basis.

II.

Hans S. Hollander was married to Idy Hollander on September 30, 1937. One child was born of said marriage, namely Barbara Mia Hollander, born August 12, 1940.

III.

On March 6, 1946, in contemplation of divorce, a property settlement agreement was entered into by and between Hans S. Hollander and Idy Hollander. Under the terms of said property agreement, a copy of which is attached hereto, marked "Exhibit 1A," and incorporated by reference as if fully set out herein, Hans S. Hollander agreed to make certain payments for the support and maintenance of Idy Hollander.

IV.

On or about June 12, 1946, Idy Hollander, then a resident of the State of Nevada, instituted divorce proceedings against Hans S. Hollander. On June 12, 1946, a decree of divorce was entered by the Nevada court, under the terms of which the aforesaid property settlement agreement of March 6, 1946, was made a part of the decree and the parties ordered to comply therewith. Thereafter, Hans S. Hollander performed all of his obligations under said agreement pursuant to said decree of said court.

V.

On March 16, 1948, Hans S. Hollander and Idy Hollander entered into a second agreement. A true and correct copy of said agreement of March 16, 1948, is attached hereto, marked "Exhibit 2B," and incorporated by reference as if fully set out herein.

VI.

The divorce obtained by Idy Hollander from Hans S. Hollander was not contested by Hans S. Hollander. Subsequent to such divorce, Idy Hollander made known to Hans S. Hollander the fact that she desired to remarry. The person whom Idy Hollander desired to marry was relatively impecunious. In addition, subsequent to the divorce, and because of various circumstances, Idy Hollander had not been able to keep the child, Barbara Mia Hollander, with her, and by mutual agreement said child had lived with Hans S. Hollander since No

vember, 1946. Under the first property settlement agreement of March 6, 1946, which was incident to the decree of divorce, the terms provided that upon the remarriage of Idy, Hans would be relieved of further alimony obligations, said agreement further provided that Idy Hollander was to have custody of the said child. In order to enable the remarriage of Idy Hollander and to obtain legal custody of the said child, Hans S. Hollander voluntarily entered into the second agreement of March 16, 1948.

VII.

Idy Hollander remarried on March 29, 1948.

VIII.

Subsequent to June 12, 1946, Idy Hollander had become a resident of the State of California. On or about May 18, 1948, an action was instituted by Hans S. Hollander in the Superior Court of the State of California in and for the County of Los Angeles, to establish the Nevada judgment of divorce as a foreign judgment. On June 30, 1948, the decree of the California court was entered. A true and correct copy of said decree is attached hereto, marked "Exhibit 3C," and incorporated by reference as if fully set out herein.

IX.

Hans S. Hollander married Clemence Blum Hollander on or about August 5, 1948. Hans S. Hollander is presently a resident of Los Angeles, California, and Clemence Blum Hollander is presently a resident of San Francisco, California.

X.

During the calendar year 1948, Hans S. Hollander made twelve monthly payments of $550 apiece to his former wife, paid $1,990.40 to the Federal Government on account of his former wife's liability for 1947 Federal income taxes and $67 to the State of California on account of his former wife's liability for 1947 California income taxes. The aggregate amount of these payments was $8,657.40. Taxpayers claimed the full amount of said payments as an alimony deduction on their 1948 income tax return. During the calendar year 1949, Hans S. Hollander made twelve monthly payments of $550 apiece to his former wife, paid $1,225.44 to the Federal Government on account of his former wife's liability for 1948 Federal income taxes, and $42 to the State of California on account of his former wife's liability for 1948 California income taxes. The aggregate amount of these payments was $7,867.44. Taxpayers claimed the full amount of said payments as an alimony deduction on their 1949 income tax return.

In connection with the amount claimed by taxpayers as an alimony deduction on their 1948 income tax return, the Commissioner of Internal Revenue allowed the following amounts:

$2,057.40—representing amounts paid by Hans S. Hollander on account of his former wife's 1947 liability for Federal and California income taxes, and

$1,650.00—representing three monthly payments of $550 apiece made by Hans S. Hol-

lander during the first three months of 1948 to his former wife.

The balance of the amount claimed as an alimony deduction on taxpayers' 1948 income tax return was disallowed. The entire amount claimed by taxpayers as an alimony deduction on their 1949 income tax return was disallowed by the Commissioner of Internal Revenue.

/s/ EDWARD SANDER,
Counsel for Petitioners.

/s/ R. P. HERTZOG, R.E.M.
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

EXHIBIT 1-A

Property Settlement Agreement

This Agreement, made and entered into in the City of Los Angeles, County of Los Angeles, State of California, this 6th day of March, 1946, by and between Idy Hollander, hereinafter for convenience referred to as the "wife," and Hans S. Hollander, hereinafter for convenience referred to as the "husband,"

Witnesseth:

The husband and wife represent:

(a) That they were lawfully married in Phoenix, Arizona, September 30, 1937, and ever since said date have been, and are now, husband and wife;

(b) That they have as a result of said marriage one minor child, namely, Barbara Mia Hollander, born August 12, 1940, hereinafter referred to as the "child";

(c) That irreconcilable differences and controversies have arisen between them, both as to their marital relations and their property rights;

(d) That the parties are now living separate and apart and are permanently separated, although, because of the housing shortage, the parties are continuing to reside in the same house, but are occupying separate and distinct quarters;

(e) That they desire to make, on a fair and equitable basis, a permanent and final settlement and adjustment between themselves with regard to their assets, property and property rights and obligations for support and maintenance which each has or may have or owe to the other or to the minor child;

(f) That a full and complete disclosure has been made on the part of each of them to the other as to their property holdings and debts.

Now, Therefore, it is hereby agreed that in consideration of the mutual promises, conditions, agreements, covenants and terms herein contained, each of the parties hereto promises and agrees as follows:

1. Until such time as a valid interlocutory decree of divorce, or a decree of separate maintenance may be entered, if any, and under the conditions

enumerated below, the husband shall make certain payments for the support, care, and maintenance of the wife:

(a) Until such time as the wife finds quarters outside of the house in which she now lives, no payments shall be made by the husband to the wife hereunder, but the husband will continue to pay for the support and maintenance of the wife and child as heretofore. The wife agrees to make reasonable efforts to find such quarters, both parties understanding that the present housing shortage may render this difficult.

(b) If the wife is able to find quarters for herself and the child outside of the house in which she now lives, the husband agrees to pay to the wife Seven Hundred Dollars ($700.00) per month in lieu of the obligation referred to in subdivision (a) above during the period in which the wife resides outside of said house with the child. Out of this payment, the wife shall apply such sums as are reasonably necessary for the support, care, maintenance and education of the child. In addition to this sum, husband shall reimburse the wife for necessary bills incurred by the wife in providing for the child reasonable clothes, piano lessons and private schooling if used, and also for any extraordinary medical and dental expenses of the child.

(c) Any sums which may become payable under the provisions of (b) of this paragraph shall be

payable in advance on the 1st day of each month, and the first payment shall be due on the 1st day of the month immediately following the month in which such housing is secured, at which time the prorated portion of the moneys due for the portion of the last preceding month for which payment may be owing shall also be paid.

2. Upon entry of a valid interlocutory decree of divorce or decree of separate maintenance, the husband agrees to pay to the wife from and after the entry of said decree and in lieu of the payments referred to in paragraph 1 hereof, an amount equivalent to $10,000.00 per year, payable at the rate of one-twelfth (1/12) of said amount per month, for alimony, support, maintenance and care of the wife and child; provided, however, that if the amount so payable is greater than one-third (⅓) of the income received by the husband for the year concerned, then said yearly amount shall be reduced to an amount equivalent to said one-third (⅓) of said income so received by the husband, which lesser sum shall likewise be payable one-twelfth (1/12) thereof for each month during the year concerned. If by reason of the income of the husband, the husband has overpaid the wife, then an adjustment shall be made to effect the correct amount payable, and for this purpose the husband shall have the right to withhold payments, or portions thereof, if it be necessary to effect the correct amount payable to the wife hereunder. In addition to the payments referred to in the second preceding

sentence, the husband shall reimburse the wife for necessary bills incurred by the wife in providing for the child reasonable clothing, piano lessons, and private schooling, if used (so long as the child is a minor), and also for any extraordinary medical and dental expenses of the child. Any payments under the provisions of this paragraph 2 shall commence immediately following the entry of said decree and shall continue from and after said date for the remainder of the wife's natural life, or until such time as she shall remarry. If the wife shall remarry, then immediately upon the occurrence of said remarriage, payments as set forth in this paragraph 2 shall automatically cease, but in the event of such remarriage the husband shall continue to pay for the support of the child so long as the child is a minor in an amount which shall be agreed upon by and between the parties hereto, or, if the parties cannot so agree, as determined by Court. In any event, payments provided for in this paragraph and in paragraph 1 hereof shall automatically cease and terminate upon the death of the husband. However, should there remain any payments due and unpaid upon the death of the husband, it is agreed that such payments shall become obligations of the estate of the husband. Out of the payments made to the wife as provided for in this paragraph 2, the wife shall apply such sums as are reasonably necessary for the support, care, maintenance and education of the child, and the wife now undertakes such support, care, mainte-

nance and education in a manner reasonably commensurate with that of a child in a home comparable to the home heretofore maintained by the parties. Out of the sums provided for in this paragraph 2 the wife shall pay all income taxes which may be assessed on account of the payments made under the provisions of this paragraph but in this connection the wife authorizes and directs the husband to withhold from the payments made under this paragraph 2 the amount necessary to pay such taxes and the husband agrees to utilize the amount so withheld in the payment, on behalf of the wife, of her said income taxes, but in this connection the husband shall be under no obligation to pay any amount on behalf of the wife on account of such taxes in excess of that withheld hereunder and the husband shall not be liable or responsible in the event that the amount so withheld and so paid shall not be sufficient to pay the full income taxes of the wife, it being the intention hereof that this procedure is followed as an accommodation to the wife and to assure the wife that the amount necessary for the payment of such taxes by the wife shall not be dissipated. In this connection, if the parties so agree, the husband may cause to be prepared the wife's tax return but all expenses relating to such preparation or otherwise in connection with the wife's taxes shall be borne solely by the wife.

3. There are presently in existence the following life insurance policies upon the life of the husband:

(a) Policy #3861297 in the amount of $24,000.00 with the John Hancock Life Insurance Company;

(b) Policy #5890-P in the amount of $15,000.00 with the John Hancock Life Insurance Company;

(c) Policy #4030885 in the amount of $2,700.00 with the John Hancock Life Insurance Company;

(d) Policy #4030886 in the amount of $8,011.00 with the John Hancock Life Insurance Company.

The husband does agree to make the wife (or in case of her death or remarriage, the child) the sole irrevocable beneficiary under the aforementioned life insurance policies (except that the child shall be the beneficiary as to $5,000.00) and agrees to maintain the said policies and to pay the premiums thereon. The terms of payment under the aforementioned policies, i.e., by installments, lump sums, etc., shall be in the discretion of the husband if they are to be made to the child and the wife is dead, and shall be in the discretion of the wife if they are to be made to the wife or to the child while the wife is alive; however, if the wife shall have remarried, the investment of the proceeds shall be jointly agreed upon by her and the husband's personal representatives.

4. The wife shall have the care, custody and control of the child but the husband shall have the full right of visitation at reasonable hours but as often as the husband desires. The husband shall have the right, if he so desires, to have the care, custody and control of the child during so-called

vacation months (i.e., the summer months between regular school terms) and if the husband exercises such right (which he shall have the right to do with respect to such vacation periods as he desires, it being understood that failure of the husband to exercise such right with respect to any particular vacation period shall not be deemed a waiver of the husband's right to exercise such right with respect to a later vacation period), then the wife shall have full right of visitation at reasonable hours but as often as the wife desires. Neither party shall have the right to take the child out of the State of California without first obtaining the written consent of the other. If the wife leaves the State of California without the child and (except for causes beyond her reasonable control) remains away from the State in excess of a consecutive period of one (1) year, then permanent and full custody of the child shall go to the husband, subject to the right of full visitation by the wife at reasonable hours but as often as the wife desires. Upon the death of either party, either before or after his or her remarriage, if any, permanent and full custody of the child shall go to the other party hereto. The wife agrees to provide a good, normal and regular education for the child commensurate with the child's present social and economic standing and to furnish a nurse or maid at all times in which the wife has custody of the child hereunder. If the wife fails to furnish said education, nurse or maid the husband may furnish the same and deduct the expense of the same from the sums pay-

able to the wife pursuant to paragraphs 1 or 2 as the case may be. In the event that the wife desires to place the child in a boarding school, then the husband shall have the right to approve such boarding school and in the absence of such approval, the wife shall place the child in a school selected by the husband.

5. The wife does hereby assign, set over and sell to the husband as his sole and separate property all the wife's interest in and with respect to the residence of the parties hereto located at 9101 Hazen Drive, Beverly Hills, California, as well as all furniture, furnishings and equipment contained in said residence and the wife agrees to execute the necessary deeds and bills of sale to effect such transfer. In full consideration of said transfer and of the rights granted by the wife to the husband under the provisions of this paragraph 5, the husband agrees to pay concurrently with the execution hereof the sum of Ten Thousand Dollars ($10,000.00).

6. The parties hereto agree that all of the clothing, jewelry, and personal effects of the wife, and the Studebaker automobile in her possession shall be retained by the wife as her separate property, and the husband does hereby release and relinquish, assign, transfer and set over to the wife as her sole and separate property each and all of the items referred to in this paragraph.

7. All of the earnings of either or both of the husband and wife (except the earnings and accumu-

lations of the wife while she is living separate from the husband) shall be community property of the parties until entry of a valid interlocutory decree of divorce, if any. The husband agrees to pay all income taxes on the past and future community income and to indemnify the wife against liability therefor. Upon entry of such decree, the subsequent earnings of each party shall be the separate property of the party earning the same.

8. It is agreed that all of the rest and remainder of the property of the parties, except as hereinabove set forth, is and shall be deemed to be the separate property of the husband.

9. The husband and wife do hereby release, acquit, and forever discharge the other from any and all claims which he or she now has or may hereafter have against or upon the other for payment of maintenance or alimony excepting as herein provided. Each of the parties hereto agrees that he or she will not under any circumstances ask any court in any divorce or separate maintenance action or otherwise for any allowance for alimony, support and maintenance or for any decree, judgment or order affecting the property rights of the parties hereto other than as provided and set forth in this agreement.

10. The partes hereto will forthwith execute, acknowledge and deliver any and all deeds, bills of sale, assignments or other instruments necessary or proper to carry into effect the stipulations, terms and provisions herein contained.

11. Each of the parties hereto waives, renounces and relinquishes all right to administer upon the estate of the other hereto at the death of the said other party, hereby agreeing to forego any and all rights that either may have to inherit from the other or to administer upon the estate of the other or to secure any homestead upon or from the estate of the other or family allowance. Nothing herein contained, however, shall affect the provisions of any will or testamentary disposition made by either party hereto in favor of the other.

12. It is agreed between the parties that should the wife be caused to retain legal counsel to enforce any of the provisions of this agreement or any order of any court of competent jurisdiction made pursuant thereto, that if the wife prevails in said proceedings the husband will pay to the wife in addition to the payments in this agreement otherwise provided to be made, such further and additional sums as may be reasonable for attorney's fees.

13. Neither of the parties hereto shall interfere with the other in his or her personal liberty, conduct or action; each of the parties agrees that the other at any and all times may live separate and apart, may reside at such places and may follow and carry on such business, occupation or profession as he or she may choose to the end that each of the parties shall hereafter have a full and independent liberty, freedom of action and conduct

insofar as their mutual obligations, duties and responsibilities are concerned.

14. Each of the parties agrees and promises to incur no indebtedness or obligation of any kind or character whatsoever subsequent to the execution of this agreement which shall be a charge against the other.

15. It is agreed that if any paragraph, subparagraph, sentence, clause or phrase of this agreement is for any reason void or unenforceable, such portion of this agreement shall not affect the validity of the remaining portions thereof.

16. It is agreed that the terms and provisions of this agreement shall inure to and be binding upon the heirs, executors and legal representatives of the parties.

17. It is further expressly understood that although this agreement does not have as its object the dissolution of the marriage contract of the parties or the facilitating of that result and is intended solely as an adjustment of the property rights of the parties, this agreement may be submitted to a court of competent jurisdiction acquiring jurisdiction of the parties for its approval and the terms thereof may be incorporated in and enforced by any Decree of Divorce or Separate Maintenance or other order hereafter obtained by either of the parties hereto in lieu of any provision of a similar nature by the court in such decree or order.

18. Time is of the essence of this agreement.

19. The parties hereto acknowledge that they have carefully read this agreement and have each engaged attorneys to advise them in the premises, and that they understand each and every provision thereof, that said agreement is fair and just in all its particulars and that they enter into the same respectively of their free and voluntary will.

In Witness Whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

/s/ IDY HOLLANDER,
Wife.

/s/ HANS S. HOLLANDER,
Husband.

I, H. F. Birnbaum, hereby certify that the within is a true and correct copy of the property settlement agreement between Idy Hollander and Hans S. Hollander, dated March 6, 1946.

[Seal] /s/ H. F. BIRNBAUM,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 17, 1950.

EXHIBIT 2-B

Agreement

This Agreement made and entered into in the City of Los Angeles, County of Los Angeles, State

of California, this 16th day of March, 1948, by and between Idy Hollander, hereinafter for convenience referred to as the "First Party," and Hans S. Hollander, hereinafter for convenience referred to as the "Second Party,"

Witnesseth:

Whereas, the parties hereto were heretofore married and were legally divorced on the 12th day of June, 1946, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, and,

Whereas, prior to said decree the parties entered into a Property Settlement Agreement dated March 6, 1946, which Property Settlement Agreement was referred to under the provisions of said decree and was incorporated therein and was ratified and confirmed, and,

Whereas, said Property Settlement Agreement provides for certain payments to be made by Second Party to First Party until such time as First Party remarries and not thereafter and provides that the child of the parties, to wit: Barbara Mia, shall remain in the custody of the First Party with the rights of visitation and other rights in the part of Second Party, and,

Whereas, by reason of various circumstances First Party has not been able to keep said child with her and by mutual agreement since the divorce of the parties hereto said child has been and now is with the Second Party, and,

Whereas, pursuant to said Property Settlement Agreement, Second Party has paid to First Party continuously the sum of Five Hundred Fifty Dollars ($550) per month, representing the net amount payable to First Party under said Agreement after the withholding of taxes and withholding the amount of salary payable for the services of the child's nurse pursuant to the Agreement of the parties hereto, and,

Whereas, First Party desires to remarry, but nevertheless desires that said payments be continued to be made by Second Party to First Party after such remarriage for a period of time, notwithstanding the provisions of said Property Settlement Agreement in said decree, and Second Party is willing to continue to make such payments upon conditions hereinafter set forth, and,

Whereas, the parties hereto desire that certain revisions be entered into in said Property Settlement Agreement,

Now, Therefore, It Is Agreed as Follows:

1. Notwithstanding the provisions of said Property Settlement Agreement, and in settlement of Second Party's obligations for alimony under said Property Settlement Agreement, Second Party will continue to pay to First Party the sum of Five Hundred Fifty Dollars ($550) per month on the first day of each and every month, beginning with the first day of March, 1948, and continuing to and including the first day of February, 1951, and shall

pay to First Party the sum of Two Hundred Fifty Dollars ($250) per month from the first day of March, 1951, until the first day of February, 1954. Said payments shall continue as provided in this paragraph notwithstanding the fact that the First Party remarries at any time hereafter, and should Second Party die prior to February 1, 1951, said payments shall continue until February 1, 1951, and shall be payable by the estate of Second Party as herein provided until said first day of February, 1951, and not thereafter. Should Second Party die between February 2, 1951, and February 28, 1954, said payments shall cease on the date of his death. Said payments shall cease upon the death of First Party. Whether or not First Party remarries, the obligations of Second Party to First Party to make payments under this agreement or under said agreement of March 6, 1946, or otherwise, shall cease with the payment to be made on February 1, 1954, or on the date of the death of the First Party, whichever event earlier occurs. In the event that the amount payable pursuant to this paragraph exceeds forty per cent (40%) of Second Party's income (defined as the moneys earned by Second Party, either as salary, dividends or bonuses or otherwise) during any year for which such payments are to be made hereunder (and for this purpose each year beginning March 1 shall be deemed the accounting period) then the amount to be paid by Second Party to First Party shall be reduced to said forty per cent (40%) of said income so earned by Second Party. For this purpose Second

Party may estimate his income at any time and may make payments at a reduced amount if by reason of his income it appears that such reduction may be made, and at the end of the calendar year concerned, an adjustment shall be made between the parties (except that First Party shall not be required to refund any moneys to Second Party) to the end that Second Party has paid during the year concerned the amount which he is obligated to pay pursuant to the provisions of this paragraph. If by reason of the provisions of this paragraph, First Party receives less than the amount provided to be paid First Party by Second Party in the first sentence of this paragraph, then First Party shall be entitled to receive any such deficiency at any time thereafter provided the amount earned by Second Party under the formula hereinabove set forth is sufficient to permit Second Party to make such payment covering such deficiency to First Party. For the purpose of illustration only, if at the end of the third year by reason of the formula hereinabove provided there is Two Thousand Dollars ($2,000) that was not paid to First Party of the amount payable by Second Party to First Party, and if Second Party has no income for the following four years, but in the fifth year has an income of Four Thousand Dollars ($4,000), then Sixteen Hundred Dollars ($1,600) (40% of $4,000) shall be payable during said year at the rate of one-twelfth (1/12) of the amount each month. There still would be a deficiency of Four Hundred Dollars ($400), plus any other deficiency which might

have occurred during the fourth, fifth or sixth years of this agreement, and this deficiency would be payable similarly, depending upon the income of Second Party. It is further understood and agreed that one of the important considerations moving Second Party to make payments to First Party during the fourth, fifth and sixth years hereof at the rate of Two Hundred Fifty Dollars ($250) per month, is the fact that the child of the parties is now remaining with Second Party. Payments for said fourth, fifth and sixth year shall cease if and when continuous custody is given to the First Party during or prior to the commencement of said third, fourth or fifth years, and First Party from and after said date waives any claim to such payments pursuant to the provisions of this paragraph. The obligation of the Second Party to make payments to the First Party pursuant to the provisions of this paragraph are in settlement of the obligations of Second Party to support First Party pursuant to the provisions of Paragraph 2 of the Property Settlement Agreement dated March 6, 1946. In consideration of the Second Party's agreement to make payments under this agreement notwithstanding the remarriage of First Party, the provisions of Paragraph 2 of the Property Settlement Agreement dated March 6, 1946, are hereby cancelled and terminated and shall have no force or effect whatsoever, it being expressly understood and agreed that the sole obligation on the part of Second Party to First Party for support, alimony and/or mainte-

nance by reason of the prior marriage between the parties hereto shall be as set forth in this agreement which shall supersede and take the place of the provisions of said Paragraph 2 of said Property Settlement Agreement. First Party does hereby waive any claim for support, maintenance, or otherwise except as in this agreement provided and does release Second Party of any other claims, demands and causes of action of any kind or character except as provided in this agreement. In the event the payments made to First Party pursuant to the provisions hereof are held to be taxable to First Party under the Income Tax Laws of the State or Federal Government, then Second Party shall pay such taxes to such governmental authorities for First Party. The obligations on the part of Second Party to defray such income tax obligations of First Party shall be limited to the amount which would be assessable to First Party if the payments made by Second Party to First Party pursuant to the provisions hereof were the only income of the First Party.

2. The parties hereto acknowledge that the child of the parties, Barbara Mia, has by mutual agreement remained with the Second Party since November, 1946. First Party acknowledges that at present the best interests and welfare of said child are served by said child remaining with Second Party, and agrees that until such time as First Party feels that the surroundings of said child with Second Party have changed to the detriment of the in-

terests and welfare of said child, said child shall remain with Second Party, but with full rights of visitation by First Party. In the event that at any time hereafter by reason of the changed circumstances as above provided First Party demands that said child from that time forward shall remain with First Party, and if Second Party claims that the removal of said child as demanded by First Party is not in the best interests and welfare of said child, then said matter shall be submitted for decision by a recognized child psychiatrist licensed as a specialist in this field. Said child psychiatrist shall be a Doctor of Medicine (M.D.), and if the parties cannot agree on a particular child psychiatrist, the same shall be referred to the appropriate court having jurisdiction for the purpose of appointing such child psychiatrist. The expenses of such submission shall be borne by the Second Party. It is not intended by the provisions hereof to deprive any court having appropriate jurisdiction of such matter of such jurisdiction, but this agreement is entered into because both parties recognize that the child's welfare is of the highest importance. Neither party shall have the right to take the child out of the State of California without first obtaining the written consent of the other. In the event of the death of either party, sole custody shall be in the other. During such time as the said child is lawfully with First Party, Second Party shall, in addition to such other obligations as he may have pursuant to the provisions hereof, pay for the support of said child in the amount of One Hundred

Fifty Dollars ($150) per month, together with an additional amount necessary to provide clothing, private schooling expenses and extraordinary medical expenses for said child. Whenever said child is in the care and custody of one parent, the other parent shall at all times have the right of reasonable visitations. In the event that at such time, if any, that the First Party is entitled to custody of the child hereunder, and said First Party desires to place said child in a private school, then the Second Party shall have the right to approve such private school, and in the absence of such approval First Party shall place the child in the school selected by Second Party. The provisions of this paragraph shall be and be deemed to be in substitution for the provisions of Paragraph 4 of said Property Settlement Agreement which provisions of Paragraph 4 are and shall be deemed to be cancelled.

3. Second Party shall continue to maintain the life insurance policies upon the life of Second Party which are referred to in Paragraph 3, except that said policies shall provide that in the event of death of Second Party, there shall be paid to First Party for the sole benefit of said Barbara Mia, and so long as she is a minor and is living with and supported by First Party, the sum of Five Hundred Dollars ($500) per month. The payments provided in this paragraph to be made shall, however, not commence until the completion of the payments to be made by Second Party to First Party pursuant to the provisions of Paragraph 1 hereof. In addition to said

sum of Five Hundred Dollars ($500) per month, referred to in this paragraph, expenses of clothing, extraordinary medical care and private schooling shall be supplied for said child so long as she is a minor and is living with and supported by First Party.

4. As further consideration of the agreements of First Party, Second Party has concurrently herewith paid to First Party the sum of Six Hundred Dollars ($600), receipt of which is hereby acknowledged. In addition, Second Party has paid to Milton Wichner the sum of Two Hundred Fifty Dollars ($250), and agrees to pay the additional sum of Two Hundred Fifty Dollars ($250) to said Milton Wichner on or before June 1, 1948. Said payment of Five Hundred Dollars ($500) shall be deemed to be the full payment to be made on account of attorney's fees incurred by First Party in connection with the negotiation and execution of this agreement and the approval thereof by a court of competent jurisdiction as herein contemplated. Second Party shall not be called upon to make any further payments on account of First Party's attorney's fees in connection with said matters.

5. Nothing in this agreement contained shall be deemed to modify or affect said decree of divorce between the parties hereto except only as each party hereto agrees to certain modifications of said Property Settlement Agreement, which modifications do not and shall not be deemed to affect the divorce

of the parties and the termination of their marital status pursuant to said decree. Except as herein specifically set forth, said Property Settlement Agreement dated March 6, 1946, between the parties hereto is and shall be and remain in full force and effect.

6. It is understood and agreed that each of the parties hereto have been advised of their rights hereunder, First Party by her attorney, Milton Wichner, and Second Party by his attorneys, Prinzmetal & Grant. It is agreed that this agreement may be submitted by either party hereto to any court of competent jurisdiction for approval and that the same may be incorporated in any order or decree by such Court. If any part of this agreement is invalid or unenforceable such part shall not affect or impair any of the other provisions hereof.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first hereinabove set forth.

/s/ IDY HOLLANDER,
First Party;

/s/ HANS S. HOLLANDER,
Second Party.

EXHIBIT 3-C

(Copy)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. SMC 1910

HANS S. HOLLANDER,

Plaintiff,

vs.

IDY HOLLANDER MARESCH,

Defendant.

ORDER ESTABLISHING JUDGMENT OF DIVORCE SECURED IN SISTER STATE AND APPROVING AGREEMENT FOR ALIMONY, CUSTODY, ETC.

This cause came on to be heard before Honorable Stanley Mosk, Judge Presiding in Santa Monica, Department A, on the 30th day of June, 1948, I. H. Prinzmetal of Prinzmetal & Grant appearing as attorney for the plaintiff, the defendant having filed a Notice of Appearance through her attorney, Milton Wichner, and no answer having been filed by the defendant, and the default of the defendant having been duly entered and the parties hereto having filed a Stipulation consenting to the entry of this Order,

It Is Ordered, Adjudged and Decreed:

(1) That the judgment of divorce rendered by the Eighth Judicial District of the State of Nevada

in and for the County of Clark be established as a foreign judgment and that the same be enforced in this action subject to modifications as herein set forth;

(2) That the agreement between the parties dated March 16, 1948, be and the same is hereby ratified, confirmed and approved and the plaintiff is ordered to make payments to the defendant pursuant to said property settlement agreement.

(3) It Is Further Ordered, Adjudged and Decreed that until the further order of the Court the Plaintiff be and he is hereby awarded the care, custody and control of Barbara Mia Hollander, the minor child of the parties hereto but with full rights of visitation by the defendant.

Done in Open Court this 30th day of June, 1948.

STANLEY MOSK,
Judge.

Filed at hearing April 26, 1955.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Petitioner and Idy Hollander were divorced in June, 1946. Two months prior thereto, they entered into an agreement of permanent and final settlement with regard to their property and obligations for support and maintenance, which each had or

owed to the other, and this agreement was "ratified, confirmed and approved" in the decree of divorce. Under the agreement, Idy was to receive alimony payments for the remainder of her life or until her remarriage, and in the latter event, the payments were to cease automatically. In 1948, Idy advised petitioner that she desired to remarry. The man she desired to marry was "relatively impecunious," and "in order to enable" her to remarry, petitioner entered into a new agreement with her, whereunder, notwithstanding the limitations of the first agreement, petitioner agreed to make specified monthly payments to Idy subsequent to her remarriage. Idy was married within two weeks of the execution of the latter agreement. Held, that the payments made to Idy subsequent to her remarriage were not made under a written agreement incident to the divorce of petitioner and Idy, within the meaning of section 22 (k) of the Internal Revenue Code of 1939, but under an agreement incident to Idy's remarriage, and that the said payments are not, therefore, deductible by petitioners under section 23 (u) of the Code.

EDWARD SANDERS, ESQ.,
For the Petitioners.

RICHARD W. JANES, ESQ.,
For the Respondent.

Respondent determined deficiencies in income tax against petitioners for the taxable years 1948 and 1949 in the respective amounts of $6,866.59 and

$3,947.58. The question is whether certain payments made by Hans S. Hollander in 1948 and 1949 to his former wife are deductible by him and his present wife under section 23 (u) of the Internal Revenue Code of 1939. No witnesses being called, the proceeding herein was submitted on certain documentary evidence and facts stipulated by the parties.

Findings of Fact

The facts which were stipulated are found as stipulated.

Petitioners are and have been since August 5, 1948, husband and wife. They filed their income tax returns for the years 1948 and 1949 with the collector of internal revenue for the first district of California.

Hans S. Hollander, sometimes referred to as petitioner, was married to Idy Hollander on September 30, 1937. One child, Barbara Mia Hollander, was born of the marriage, on August 12, 1940.

On March 6, 1946, in contemplation of divorce, an agreement was entered into by and between the petitioner and Idy Hollander, which agreement was declared to be a permanent and final settlement of property or property rights and obligations for support "which each has or may have or owe to the other or to the minor child." Under the terms of the agreement petitioner agreed to make certain payments for the support and maintenance of Idy Hollander. The agreement was in part as follows:

Property Settlement Agreement

This Agreement, made and entered into in the City of Los Angeles, County of Los Angeles, State of California, this 6th day of March, 1946, by and between Idy Hollander, hereinafter for convenience referred to as the "wife," and Hans S. Hollander, hereinafter for convenience referred to as the "husband,"

Witnesseth:

The husband and wife represent:

* * *

(e) That they desire to make, on a fair and equitable basis, a permanent and final settlement and adjustment between themselves with regard to their assets, property and property rights and obligations for support and maintenance which each has or may have or owe to the other or to the minor child;

* * *

2. Upon entry of a valid interlocutory decree of divorce or decree of separate maintenance, the husband agrees to pay to the wife from and after the entry of said decree and in lieu of the payments referred to in paragraph 1 hereof, an amount equivalent to $10,000.00 per year, payable at the rate of one-twelfth (1/12) of said amount per month, for alimony, support, maintenance and care of the wife and child; provided, however, that if the amount so payable is greater than one-third (1/3) of the income received by the husband for

the year concerned, then said yearly amount shall be reduced to an amount equivalent to said one-third (1/3) of said income so received by the husband, which lesser sum shall likewise be payable one-twelfth (1/12) thereof for each month during the year concerned. If by reason of the income of the husband, the husband has overpaid the wife, then an adjustment shall be made to effect the correct amount payable, and for this purpose the husband shall have the right to withhold payments, or portions thereof, if it be necessary to effect the correct amount payable to the wife hereunder. In addition to the payments referred to in the second preceding sentence, the husband shall reimburse the wife for necessary bills incurred by the wife in providing for the child reasonable clothing, piano lessons, and private schooling, if used (so long as the child is a minor), and also for any extraordinary medical and dental expenses of the child. Any payments under the provisions of this paragraph 2 shall commence immediately following the entry of said decree and shall continue from and after said date for the remainder of the wife's natural life, or until such time as she shall remarry. If the wife shall remarry, then immediately upon the occurrence of said remarriage, payments as set forth in this paragraph 2 shall automatically cease, but in the event of such remarriage the husband shall continue to pay for the support of the child so long as the child is a minor in an amount which shall be agreed upon by and between the parties hereto, or, if the parties cannot so agree, as determined by

Court. In any event, payments provided for in this paragraph and in paragraph 1 hereof shall automatically cease and terminate upon the death of the husband. * * *

* * *

9. The husband and wife do hereby release, acquit, and forever discharge the other from any and all claims which he or she now has or may hereafter have against or upon the other for payment of maintenance or alimony excepting as herein provided. Each of the parties hereto agrees that he or she will not under any circumstances ask any court in any divorce or separate maintenance action or otherwise for any allowance for alimony, support and maintenance or for any decree, judgment or order affecting the property rights of the parties hereto other than as provided and set forth in this agreement.

On or about June 12, 1946, Idy Hollander, then a resident of Nevada, instituted divorce proceedings against petitioner. Petitioner did not contest the proceeding and on June 12, 1946, a decree of divorce was entered by the Nevada court, under the terms of which the agreement of March 6, 1946, was made a part of the decree, and the parties were ordered to comply therewith. Thereafter petitioner performed all of his obligations under the said agreement pursuant to the decree of the court. The decree of divorce was as follows:

Decree of Divorce

The above-entitled action coming on regularly for trial before the above-entitled Court, without a jury, on the 12th day of June, 1946, plaintiff appearing in person and by her attorneys, Jones, Wiener and Jones, and the defendant having made a general appearance by and through his attorney, Oscar W. Bryan, and having filed an Answer and waived the right to findings of fact and conclusions of law and consenting to the trial of the above-entitled action, and the Court having heard and duly considered the evidence, and good cause appearing therefor;

It Is Ordered, Adjudged and Decreed that the bonds of matrimony now and heretofore existing between the plaintiff and defendant be, and the same are hereby dissolved, set aside, and held for naught, and the parties restored to their single status.

It Is Further Ordered, Adjudged and Decreed that the property settlement agreement of the 6th day of March, 1946, be, and the same is hereby ratified, confirmed and approved by this Court and made a part of this decree.

It Is Further Ordered, Adjudged and Decreed that the parties hereto comply with all the requirements contained in the above-mentioned property settlement agreement.

It Is Further Ordered, Adjudged and Decreed that the Court hereby retains jurisdiction of this

action and the parties hereto for the purpose of making such other and further order as may be just and proper for the custody, support and maintenance of the minor child of the parties, to wit, Barbara Mia Hollander, over whose care, custody and control there is no controversy at this time.

Dated this 12th day of June, 1946.

A. S. HENDERSON,
District Judge.

In 1948, Idy "made known" to petitioner "the fact that she desired to remarry." The man whom she desired to marry was "relatively impecunious." Although granted custody of the daughter, Barbara Mia, Idy, due to "various circumstances," had not kept the child with her but, by mutual agreement, the child had lived with petitioner after November, 1946. Notwithstanding the provision of the first agreement that the alimony payments thereunder were to cease automatically in the event of Idy's remarriage, petitioner, "In order to enable the remarriage of Idy Hollander and to obtain legal custody of the said child * * * voluntarily entered into" a second agreement under date of March 16, 1948, which, in part, was as follows:

Whereas, the parties hereto were heretofore married and were legally divorced on the 12th day of June, 1946, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, and,

Whereas, prior to said decree the parties entered into a Property Settlement Agreement dated March 6, 1946, which Property Settlement Agreement was referred to under the provisions of said decree and was incorporated therein and was ratified and confirmed, and,

Whereas, said Property Settlement agreement provides for certain payments to be made by Second Party to First Party until such time as First Party remarries and not thereafter and provides that the child of the parties, to wit: Barbara Mia, shall remain in the custody of the First Party with the rights of visitation and other rights in the part of Second Party, and,

* * *

Whereas, First Party desired to remarry, but nevertheless desires that said payments be continued to be made by Second Party to First Party after such remarriage for a period of time, notwithstanding the provisions of said Property Settlement Agreement in said decree, and Second Party is willing to continue to make such payments upon conditions hereinafter set forth, and,

Whereas, the parties hereto desire that certain revisions be entered into in said Property Settlement Agreement,

Now, Therefore, It Is Agreed as Follows:

1. Nothwithstanding the provisions of said Property Settlement Agreement, and in settlement

of Second Party's obligations for alimony under said Property Settlement Agreement, Second Party will continue to pay to First Party the sum of Five Hundred Fifty Dollars ($550) per month on the first day of each and every month, beginning with the first day of March, 1948, and continuing to and including the first day of February, 1951, and shall pay to First Party the sum of Two Hundred Fifty Dollars ($250) per month from the first day of March, 1951, until the first day of February, 1954. Said payments shall continue as provided in this paragraph notwithstanding the fact that the First Party remarries at any time hereafter, and should Second Party die prior to February 1, 1951, said payments shall continue until February 1, 1951, and shall be payable by the estate of Second Party as herein provided until said first day of February, 1951, and not thereafter. Should Second party die between February 2, 1951, and February 28, 1954, said payments shall cease on the date of his death. Said payments shall cease upon the death of First Party. Whether or not First Party remarries, the obligations of Second Party to First Party to make payments under this agreement or under said agreement of March 6, 1946, or otherwise, shall cease with the payment to be made on February 1, 1954, or on the date of the death of the First Party, whichever event earlier occurs. * * * It is further understood and agreed that one of the important considerations moving Second Party to make payments to First Party during the fourth, fifth and sixth years hereof at the rate of Two Hundred

Fifty Dollars ($250) per month, is the fact that the child of the parties is now remaining with Second Party. Payments for said fourth, fifth and sixth year shall cease if and when continuous custody is given to the First Party during or prior to the commencement of said third, fourth or fifth years, and First Party from and after said date waives any claim to such payments pursuant to the provisions of this paragraph. The obligation of the Second Party to make payments to the First Party pursuant to the provisions of this paragraph are in settlement of the obligations of Second Party to support First Party pursuant to the provisions of Paragraph 2 of the Property Settlement Agreement dated March 6, 1946. In consideration of the Second Party's agreement to make payments under this agreement notwithstanding the remarriage of First Party, the provisions of Paragraph 2 of the Property Settlement Agreement dated March 6, 1946, are hereby cancelled and terminated and shall have no force or effect whatsoever, it being expressly understood and agreed that the sole obligation on the part of Second Party to First Party for support, alimony and/or maintenance by reason of the prior marriage between the parties hereto shall be as set forth in this agreement which shall supersede and take the place of the provisions of said Paragraph 2 of said Property Settlement Agreement. First Party does hereby waive any claim for support, maintenance, or otherwise except as in this agreement provided and does release Second Party of any other claims, demands and causes

of action of any kind or character except as provided in this agreement. * * *

Idy Hollander remarried on March 29, 1948.

Subsequent to June 12, 1946, Idy had become a resident of California. On or about May 18, 1948, an action was instituted by petitioner in the Superior Court of the State of California, in and for the County of Los Angeles, to establish the Nevada judgment of divorce as a foreign judgment. On June 30, 1948, the California court entered a decree as follows:

This cause came on to be heard before Honorable Stanley Mosk, Judge Presiding in Santa Monica Department A on the 30th day of June, 1948, I. H. Prinzmetal of Prinzmetal & Grant appearing as attorney for the plaintiff, the defendant having filed a Notice of Appearance through her attorney, Milton Wichner, and no answer having been filed by the defendant, and the default of the defendant having been duly entered and the parties hereto having filed a Stipulation consenting to the entry of this Order,

It Is Ordered, Adjudged and Decreed:

(1) That the judgment of divorce rendered by the Eighth Judicial District of the State of Nevada in and for the County of Clark be established as a foreign judgment and that the same be enforced in this action subject to modifications as herein set forth;

(2) That the agreement between the parties dated March 16, 1948, be and the same is hereby ratified, confirmed and approved and the plaintiff is ordered to make payments to the defendant pursuant to said property settlement agreement.

(3) It Is Further Ordered, Adjudged and Decreed that until the further order of the Court the Plaintiff be and he is hereby awarded the care, custody and control of Barbara Mia Hollander, the minor child of the parties hereto but with full rights of visitation by the defendant.

Done in Open Court this 30th day of June, 1948.

STANLEY MOSK,
Judge.

On or about August 5, 1948, petitioner married Clemence Blum Hollander. Petitioner is presently a resident of Los Angeles, California, and Clemence Hollander is presently a resident of San Francisco.

During 1948 petitioner made twelve monthly payments of $550 each to his former wife, paid $1,990.40 to the Federal Government on account of her liability for 1947 Federal income tax and paid $67 to the State of California on account of her liability for 1947 California income tax.[1] The ag-

[1]The 1946 agreement provided for the withholding by petitioner of amounts necessary to pay all income taxes which might be assessed against Idy on account of the payments to be made under the agreement. The 1948 agreement contained a similar provision.

gregate amount of these payments was $8,657.40. Petitioners claimed the full amount of the payments as an alimony deduction on their 1948 income tax return. In connection with the amount so claimed, the respondent allowed $2,057.40 as representing amounts paid by petitioner on account of Idy's 1947 liability for Federal and California income taxes and $1,650 as representing three monthly payments of $550 each made to Idy during the first three months of 1948. The balance of the amount claimed by petitioners as an alimony deduction on their 1948 return was disallowed.

During 1949 petitioner made twelve monthly payments of $550 each to Idy, paid $1,225.44 to the Federal Government on account of her liability for 1948 Federal income tax and paid $42 to the State of California on account of her liability for 1948 California income tax. The aggregate amount of these payments was $7,865.44. Petitioners claimed the full amount of these payments as an alimony deduction on their 1949 return. The entire amount so claimed by petitioners on their 1949 return was disallowed by respondent.

Opinion

Turner, Judge:

Section 23 (u) of the Internal Revenue Code of 1939[2] provides that payments which are includible, under Section 22 (k), in the gross income of the wife, are deductible by the husband in computing his net income. In Section 22 (k)[3] it is provided

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[2]Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

* * *

(u) Alimony, Etc., Payments—In the case of a husband described in Section 22 (k), amounts includible under Section 22 (k), in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under Section 22 (k) or Section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

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[3]Sec. 22. Gross Income.

* * *

(k) Alimony, Etc., Income—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband.

that there shall be included in the gross income of the wife periodic payments received by her under a decree of divorce or a written instrument incident to the divorce and in discharge of a legal obligation which, because of marital or family relationship, is imposed upon the husband by such decree or written instrument.

Stated briefly, the facts are as follows: Petitioner and Idy Hollander were divorced in June, 1946. More than two months prior to the divorce, and in contemplation thereof, petitioner and Idy had entered into an agreement looking to the settlement of all property and support claims, one against the other. This agreement provided for alimony payments to Idy for so long as she lived or until her remarriage, or until petitioner's death, and was incorporated in the decree of divorce. The agreement specifically provided that petitioner and Idy release, acquit and forever discharge each other "from any and all claims which he or she now has or may hereafter have against or upon the other for payment of maintenance or alimony excepting as herein provided." In 1948, two years subsequent to the divorce, Idy made known to petitioner her desire to marry a man who was "relatively impecunious." "In order to enable Idy to remarry," petitioner

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This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. * * *

entered into a second agreement providing for payments to her subsequent to her pending remarriage, and Idy was remarried within two weeks of the execution of this agreement.

Respondent has disallowed all payments made subsequent to Idy's remarriage, contending that the payments were not in discharge of a legal obligation arising out of a marital or family relationship, nor in discharge of an obligation imposed or incurred under a divorce decree or written instrument incident to a divorce or separation, within the meaning of Section 22 (k), and therefore are not deductible under Section 23 (u).

It is the position of petitioner, on the other hand, that "where a divorced husband is under a continuing obligation to support his former wife, imposed by a decree or agreement incident to divorce, any payments made to discharge this obligation are payments made in discharge of an obligation arising out of the marital or family relationship, even if the obligation is revised by an agreement subsequent to divorce." He cites Dorothy Briggs Smith, 16 T. C. 639, affd. 192 F. 2d 841; Newton v. Pedrick, 212 F. 2d 357, reversing 115 F. Supp. 368; and Raoul Walsh, 21 T. C. 1063. In each of those cases, as petitioner indicates in his statement with respect to the principle contained therein, there was a "continuing obligation" on the part of the husband to support his former wife. In the instant case, that is not true, and this fact distinguishes this case from those cited.

A review of the Smith case and the rationale of the decision illustrates the variance between that case and the instant one. In the Smith case, during the pendency of divorce proceedings, in 1937 an agreement was entered into for the payment of $1,000 a year to the wife for her support and the support of the two minor children. The agreement provided that a final decision as to the support to which the wife would be entitled in her own right would be made at a later date. The divorce was thereafter granted to the wife and the 1937 agreement was made part of the final decree. In 1944, after the husband had made a motion in the divorce court for a reduction of support payments, the parties executed an agreement which terminated the provisions of the 1937 agreement and provided for the payment by the husband of $5,000 a year to the wife for her support. In 1946 the divorce court recognized this agreement. We there held that the payment of $5,000 by the husband in 1948, under the terms of the 1944 agreement, was received by the taxpayer in discharge of a legal obligation which, because of the marital relationship, was incurred by the husband under a written instrument incident to the final decree of divorce. A study of the facts of that case leads to the conclusion that the 1944 agreement was a revision of the 1937 agreement, which admittedly was incident to divorce and in discharge of the husband's obligation for support. A like study of the facts presented in the instant case leads to a contrary conclusion. Unlike the 1937 agreement in the Smith case, the 1946

agreement here did not leave open the final disposition of the amount of support to which petitioner's former wife would be entitled. To the contrary, the 1946 agreement between petitioner and Idy was specific and delineated "a permanent and final settlement and adjustment between themselves with regard to their assets, property and property rights and obligations for support and maintenance which each has or may have or owe to the other or to the minor child." The payments to be made under the 1946 agreement were automatically to cease upon Idy's remarriage, and it was further provided in the agreement that both parties released, acquitted, and forever discharged the other "from any and all claims which he or she now has or may hereafter have against or upon the other for payment of maintenance or alimony excepting as herein provided." Petitioner, under the 1948 agreement, thus agreed to make payments to his former wife even after her remarriage and for which there was and could be no obligation under the specific terms of the first agreement, which in turn had been "ratified, confirmed and approved" in the divorce decree subsequent thereto. Although the second agreement contained words to the effect that it was in settlement of petitioner's obligations for alimony under the first agreement, there could under the first agreement be no liability for the payments here in question. The decree of divorce and the 1946 agreement incorporated therein had specified with particularity that petitioner should have no obligation to support Idy after her remarriage. The 1948

agreement, however, is bottomed on her contemplated remarriage and to a man apparently incapable of supporting her in keeping with her tastes or desires. It thus appears, we think, that the second agreement was not incident to the divorce of petitioner and Idy, but incident to Idy's remarriage, and the payments made thereunder were not only not within the purpose or intent of the first agreement but petitioner's non-liability for such payments, to borrow from the words of the agreement, had been permanently and finally settled.

Petitioner argues that his promise to make payments to Idy after her remarriage was not without consideration, in that he obtained a reduction in the amount and duration of his alimony obligation to her and the immediate legal custody of his daughter. The contention that petitioner reduced the amount and duration of his alimony is necessarily based on the supposition that Idy would not remarry unless petitioner acquiesced in continuing the alimony payments, a supposition in respect of which there is no evidence whatever. With respect to the custody of the child, it appears from the 1948 agreement that petitioner had custody of the child through a "mutual agreement" with Idy prior to the execution of the 1948 agreement and that that agreement did no more than formalize what had already been accomplished in fact by the parties many months prior to the making of that agreement.

It is our conclusion, for the reasons stated, that the payments made subsequent to Idy's remarriage were not made in discharge of a legal obligation which, because of the marital or family relationship, was imposed upon or incurred by petitioner as incident to divorce, and are not within the contemplation of Section 22 (k), as petitioner contends. Accordingly, they are not deductible by him under Section 23 (u).

Decision will be entered for the respondent.

Served July 17, 1956.

Entered July 17, 1956.

The Tax Court of the United States

Docket No. 51365

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed July 17, 1956, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58.

[Seal] /s/ BOLON B. TURNER,
Judge.

Served July 19, 1956.
Entered July 19, 1956.

In the United States Court of Appeals
for the Ninth Circuit
T. C. Docket No. 51365

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Taxpayers, the Petitioners in this cause, by Lawrence E. Irell, Louis M. Brown and Edward Sanders, counsel, hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States on July 18, 1956, 26 T.C. No. 102, Docket No. 51365, determining deficiencies in the Petitioners' federal income taxes for the taxable years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58, and respectfully show:

I.

The Petitioners are individuals, and at all times material hereto, husband and wife. Hans S. Hollander is presently a resident of Los Angeles, California, and Clemence Blum Hollander is presently a resident of San Francisco, California.

The returns for the petitioners here involved were filed with the Collector for the First District of California at San Francisco, California, so that pursuant to the provisions of Internal Revenue Code of 1954, Section 7482(b)(1), (Section 1141 (b)(1) of the Internal Revenue Code of 1939), the aforesaid decision of The Tax Court of the United States may be reviewed by the United States Court of Appeals for the Ninth Circuit.

II.

Nature of the Controversy

The controversy involves the proper determination of the Petitioners' liability for federal income taxes for the calendar years 1948 and 1949. Petitioners, from and after August 5, 1948, were husband and wife. Petitioner Hans S. Hollander was previously married to Idy Hollander and the case raises the issue of whether Petitioners properly deducted certain alimony payments made by Hans S. Hollander to his former wife, Idy, during 1948 and 1949.

On March 6, 1946, in contemplation of divorce, Hans and Idy Hollander entered into a Property Settlement Agreement which, among other things,

provided for certain alimony payments to be made by Hans S. Hollander to Idy Hollander until her death or remarriage and awarded Idy Hollander custody of the child of the marriage. On June 12, 1946, the Eighth Judicial District of the State of Nevada entered its decree of divorce between the parties which incorporated the aforesaid Property Settlement Agreement of March 6, 1946, as part of the decree and ordered Hans S. Hollander to comply with the terms of said Agreement.

On March 16, 1948, and while Hans S. Hollander was under an existing and continuing legal obligation to support his former wife, imposed by the 1946 decree and Agreement, Hans and Idy Hollander entered into a modification of the 1946 Property Settlement Agreement. This modification, among other things, provided for reduced payments to Idy Hollander for a definite period whether or not she remarried, and granted Hans S. Hollander legal custody of the child of the marriage. Idy Hollander remarried subsequent to March 16, 1948.

Petitioners deducted as alimony payments made pursuant to the Agreement of March 16, 1948. The Commissioner of Internal Revenue disallowed as alimony deductions all payments made under said Agreement.

III.

The said Hans S. Hollander and Clemence Blum Hollander, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision en-

tered pursuant thereto, desire to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

The Petitioners assign as error the following acts and omissions of The Tax Court of the United States:

(1) The finding that the payments under the Agreement of March 16, 1948, were not incident to the divorce.

(2) The finding that the payments under the Agreement of March 16, 1948, were incident to Idy's remarriage to her new husband rather than the divorce from Hans S. Hollander.

(3) The finding that the payments under the Agreement of March 16, 1948, were not in discharge of a continuing obligation of support to a former wife arising out of the marital or family relationship.

(4) The failure to recognize the fact that on March 16, 1948, the date of the modifying agreement, Hans S. Hollander was under an existing and continuing legal obligation to support his former wife.

(5) The failure to take into account the fact that Idy Hollander had not remarried on March 16, 1948, the date of the modifying agreement, so that Hans S. Hollander's obligation to support his former wife was in full force and effect.

(6) The failure to give recognition to the March 16, 1948, Agreement as continuing the support obligation of Hans S. Hollander.

(7) The failure to find that the payments made by Hans S. Hollander pursuant to the Agreement of March 16, 1948, were in discharge of a legal obligation imposed upon him under a decree of divorce and under a written instrument incident to the divorce.

(8) The failure to find that the payments made by Hans S. Hollander to his former wife during 1948 and 1949 were in discharge of a legal obligation arising out of the marital or family relationship.

(9) Disregarding the order of the Superior Court in and for the County of Los Angeles, State of California.

(10) The finding of deficiency in income taxes for the calendar years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58.

LAWRENCE E. IRELL,
LOUIS M. BROWN, and
EDWARD SANDERS,
Counsel for Petitioners.

By /s/ LOUIS M. BROWN,

By /s/ EDWARD SANDERS.

Duly verified.

Received and filed October 5, 1956, T.C.U.S.

In the Tax Court of the United States

Docket No. 51365

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

Monday, April 26, 1955

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 2:00 o'clock p.m.

Before: Honorable Bolon B. Turner, J., Presiding.

Appearances:

EDWARD SANDERS, ESQ.,
For the Petitioners.

R. W. JANES, ESQ.,
(Hon. Daniel A. Taylor, Chief Counsel, Internal Revenue Service),
For the Respondent.

The Clerk: Docket 51365, Hans S. Hollander and Clemence Blum Hollander.

Will you state your appearances, please, for the benefit of the record?

Mr. Sanders: Edward Sanders for Petitioner.

The Clerk: 6399 Wilshire Boulevard, Los Angeles 48.

Mr. R. W. Janes for the Respondent.

The Court: All right. What is the case about?

Mr. Sanders: Your Honor, the facts in this case have been fully stipulated to by counsel, and I present to the Court at this time the stipulation, together with the exhibits attached thereto.

The Court: The stipulation will be received and made a part of the record.

Mr. Sanders: Your Honor, this case involves income taxes of Petitioners for the calendar years 1948 and 1949, and involves a deduction for alimony claimed by the taxpayers on their joint returns for these years.

Petitioner Hans S. Hollander was married in 1937 to Idy Hollander. In March of 1946, an agreement was entered into between Hans and Idy, his first wife, in contemplation of divorce, and a copy of that agreement is incorporated in the stipulation of facts.

In June of 1946, Idy Hollander established [3*] residence in Nevada and obtained a divorce, an uncontested divorce from Hans, and under the decree of the Nevada court the terms of the property settlement agreement of March of 1946, were incorporated into the decree, and the parties were ordered to comply with that decree.

In March of 1948, a second agreement was entered into between Idy Hollander and Hans Hol-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

lander, because of various circumstances which arose between 1946 and 1948, which facts and circumstances are set out in the stipulation.

This 1948 agreement modified and revised the 1946 agreement. Later in '48, June of '48, an action was instituted by Hans Hollander in the Los Angeles Superior Court to establish the Nevada decree of 1946 as a foreign judgment, and also to incorporate the later agreement, the 1948 agreement, into the Nevada decree.

On June 30, 1948, a decree of the California court was entered, adopting the Nevada decree as a foreign judgment, modifying it to the extent of the 1948 agreement between Idy Hollander and Hans Hollander, and ordering the parties to comply with the terms of the 1948 agreement. A copy of the decree of the California court is incorporated in the stipulation. Also, a copy of the 1948 agreement is incorporated into the stipulation.

During the calendar years 1948 and 1949 Hans Hollander made certain payments to his first wife, Idy Hollander, under [4] the provisions of the 1948 agreement. It is these payments which were deducted by Petitioners as an alimony payment which the Commissioner has disallowed.

The issue which has been discussed by the taxpayer and counsel for the Respondent has been that the Government has claimed that these payments, made under the 1948 agreement, were not made under an agreement which was incident to divorce. It is the position of the Petitioner, as will be argued on briefs, that the second agreement was

clearly incident to the divorce, and that particularly in view of the latest cases of the Tax Court, with particular reference to Raoul Walsh in 21 Tax Court at page 1063, that the agreements—the payments made under the agreement of 1948 were clearly made under an agreement which was incident to divorce and therefore deductible by Petitioners.

The Court: You take the position this is the same situation as existed and comparable to that in the Walsh case?

Mr. Sanders: We take the position that the situation in the Walsh case was even beyond the situation in this case. In the Walsh case, the parties annulled, cancelled, and abrogated an earlier agreement. I believe an agreement which was some 14 years before the modifying agreement. And as you recall, the Tax Court held in this latest Walsh case that the payments under the second agreement were incident to the divorce. In our case, in the Hollander case, the second agreement, some 18 or 19 months after the first agreement, did not cancel or abrogate the [5] first agreement. It merely modified and revised the agreement, and recited in it that all of the terms and provisions of the initial agreement were still alive and still in effect, except as changed, and the parties then went one step further and had this second agreement incorporated in a decree of the California court.

We believe that the philosophy and the spirit of the Walsh case extends to our fact situation at this time, but that our fact situation doesn't even go as far as the Court went in the Walsh case.

The Court: Do I understand you to mean by that that you think that the facts in this case are stronger for the taxpayer than were the facts in the Walsh case?

Mr. Sanders: Yes, your Honor.

The Court: All right.

Mr. Janes: At this time, Respondent would offer the joint returns of Hans S. and Clemence Blum Hollander for the year 1948. I believe it would be Exhibit D.

The Clerk: Exhibit D for the Respondent.

The Court: Very well, it will be received and marked in evidence.

(The document above referred to was marked as Respondent's Exhibit D for identification and was received in evidence.) [6]

Mr. Janes: The joint return for 1949.

The Court: That will be received and marked as Exhibit E in evidence.

(The document above referred to was marked Respondent's Exhibit E for identification and was received in evidence.)

Mr. Janes: These are photostatic copies, your Honor.

The Court: Very well.

Mr. Janes: Photostatic copy of decree of divorce, Idy Hollander versus Hans S. Hollander, State of Nevada.

The Court: Dated when?

Mr. Janes: June 12, 1946.

The Court: Exhibit F in evidence.

(The document above referred to was marked as Respondent's Exhibit F for identification and was received in evidence.)

Mr. Janes: If it please the Court, this case involves no factual issues. I believe it will be easier to summarize the issue in that there are about possibly 1,200 cases in this area, and I would like to point out that counsel for the taxpayer feels that the Walsh case is stronger for the taxpayer—or, rather, that his case is stronger for the taxpayer than the Walsh case. The area of strength, according to the opening statement of [7] Petitioners' counsel, is that in this case, the Hollander taxpayer had the second agreement incorporated in a decree of the State of California. I believe the holdings in this Court and in other courts point out that such a fact is immaterial to this issue.

The issue in this case is a legal one, and it is simply whether the payments made, which are in issue as deductions, are voluntary or under an obligation. The obligation has to arise in such a way as to the incident to a decree or the marital or family relationship. In this case, the first decree involved and incorporated therein the first property settlement between the parties. This agreement called for alimony payments in——

The Court: Which agreement are you talking about?

Mr. Janes: The first agreement. Called for

alimony payments to continue until the death or remarriage of Idy. The second agreement extended alimony payments to Idy for a period of years, regardless of remarriage. There is no obligation on the part of one spouse to make support payments to the other upon remarriage. That is to say, there is no obligation in law, morals, or the State of California for a husband to make support payments to a former wife following her remarriage. These payments, then, that are here in issue were voluntary payments. They were incorporated in no decree except the immaterial decree of the State of California. They arose—— [8]

The Court: Are you attributing to the Court in California the entering of an immaterial decree, is that what you are doing?

Mr. Janes: Well, it is our position, your Honor, in our brief I believe we can substantiate it, that if an agreement is not incident to a decree, it makes no difference if the parties go from state to state incorporating agreements that are not incident to the marital obligation; they could have a hundred decrees in 48 different states, and it would not change the law. In other words, the state law on obligation is immaterial to the tax law of obligations, which we must take from 22(k) or 23(u).

The Court: But you have to have that bottomed on state law, don't you?

Mr. Janes: It is bottomed, sir.

The Court: Because you have to have a marriage and a divorce before you can get to (k), don't you?

Mr. Janes: That is right, your Honor. We look

to 22(k) in which Congress permits deductions in the nature of ailmony which are made for obligations arising from the marital relationship. Now, on the divorce obtained in Nevada, and incorporated in that divorce, was the first property agreement. This property——

The Court: That was true of the Walsh case, wasn't it?

Mr. Janes: Yes, sir, that was. However, in the Walsh [9] case, I would like to quote from page 10 of 21 T.C. No. 120. I don't know the page number in the published volume. "The 1941 agreement,"—I am quoting—"though subsequent to the divorce, clearly came about as a direct revision and cancellation of the 1927 and 1934 agreements. The nature, origin and purpose of Petitioner's obligations under the 1941 agreement were substantially similar to the 1927 agreement, the primary change being a reduction of payments."

I would like to rephrase that in terms of our own factual situation. We have in this case two agreements. The Commissioner——

The Court: We had in the Walsh two agreements.

Mr. Janes: In our instant case we have two agreements. In the Walsh case, yes, sir, we had two agreements. The Walsh case permitted deductions paid, permitted deductions for amounts paid under the second agreement, and the reason for such permission—and I quote again—is, "* * * the nature, origin and purpose of Petitioner's obligations,"

under the second agreement were substantially similar to those under the first agreement.

Now, factually, it is the Respondent's position here that the nature of the obligation calling for the payments in this instant case is an entirely different obligation than which called for payments under the first decree, for this reason:——

The Court: In what way? [10]

Mr. Janes: For this reason, sir: That the first payments under the first decree, first agreement—excuse me—the payments were to cease upon remarriage, which is a natural and proper consideration when two parties are about to break the bonds of matrimony sit down and arrive at an economic balance for the mutual obligations of each. At that time, the mutual obligations are in effect laid out on the table and assessed dollar-wise, and all obligations thereafter are dissolved. That is to say, from thence forward, those payments made under that decree which incorporates the agreement are the residual results of changing matrimonial bonds, economic bonds.

In this instance, the first agreement called for payments to the former wife, to cease upon remarriage. In this case the facts as stipulated show that subsequent to the divorce, Idy Hollander made known to her former husband that she wished to remarry. She made known to the taxpayer that the man to whom she wished to marry was relatively impecunious and, we can infer, was unable to support her adequately in her terms. The separation in this case was not contested by this taxpayer

here. We may then assume that within the bounds of public policy it was an amicable divorce. There was no bitterness or ill feeling between the parties. Mr. Hollander, as can be inferred from the returns in evidence, was a man of means and substance. He did not desire to stand in the way economic-wise of his former wife's remarriage. Apparently, the parties felt [11] that six years of alimony payments, alimony in quotes, would help the new marriage get off to a good start. In other words——

The Court: Is this just to run for six years?

Mr. Janes: Yes, sir. In other words, this taxpayer might well be praised for his generosity and tolerance to a former wife, but unfortunately we are struck with the wordage of 22(k).

The Court: And what is that word?

Mr. Janes: Perhaps I may quote from the House of Representatives' report——

The Court: Well, let's get the statute first.

Mr. Janes: This is not a full quotation, your Honor. I have a few dots here, indicating some words are omitted, but I believe it will suffice. "22(k) In the case of the wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the periodic payments, whether or not made at regular intervals, received subsequent to such decree in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree, or under a written instrument incident to such divorce or separation, shall be includable in the gross income of such

wife." Under the Code, 23(u) is made dependent upon the 22(k) wordage.

Now, the 77th Congress, Ways and Means Committee Report, states—— [12]

The Court: Is that the one that first passed the provison?

Mr. Janes: Yes, sir. This quotation I am reading is taken from Merton's Volume 5, Section 31A.2, page 554.

The Court: I thought you were reading from the report.

Mr. Janes: I wish, your Honor, to show the source from which I picked up the quotation from the report, in case there is some variance.

The Court: All right.

Mr. Janes: "This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree."

There is no general obligation to support following the remarriage of the former spouse.

The Court: Are you quoting or making a statement?

Mr. Janes: End of quote, your Honor. I am back on my own now, and the Respondent's position on briefs. There are many cases which point out that a husband has no obligation to support a wife after her remarriage. No such obligation is imposed by statute, and there appears to be no ground for suggesting there is any moral obligation to do so, nor that there is any such obligation

arising from general law. Where, then, it is the Respondent's position, what obligation does taxpayer [13] have, is taxpayer discharging when he made the payments here in issue?

The Court: Well, I think before I make some comment about what I want you to cover on the briefs, I want to hear from the Petitioners' counsel on this matter.

Mr. Sanders: Your Honor, the Respondent has emphasized in his opening statement the fact that certain of these payments, or the payments that are in controversy, continued after the remarriage of Mr. Hollander's first wife, and that there was no obligation to support the wife imposed on Mr. Hollander under law or under the original agreement.

First, the Petitioner would like to respectfully call to the Court's attention the case of Brown versus the United States, before the United States District Court for the Northern District of California. It involved a California husband and wife situation, involved the interpretation of California law, and payments which continued after remarriage. The Court pointed out in that case that there was no requirement under 22(k) that the payments be characterized as alimony under State law, and that if the payments were in discharge of an obligation which arose out of the marital relationship and were in the nature of alimony or even separate maintenance payments, that these payments could qualify under 22(k). In addition——

The Court: Where would that fit this case?

Mr. Sanders: Well, in this case, these payments

which [14] were made after remarriage—it is Petitioners' point—that the fact that California law may not impose any obligation to make payments to the wife is really immaterial in connection with Section 22(k), as pointed out under the Brown case.

Furthermore, it is the Petitioners' position that the original obligations imposed under the Nevada decree and the first agreement were clearly—and stipulated—incident to the divorce, that these obligations assumed by the Petitioners in the second agreement arose out of the first agreement and retained the same character——

The Court: What do you mean "arose out of"? If they would have come to an end on remarriage, and these payments were after remarriage, and this agreement to pay after remarriage—how could you say that they arose out of it or were any part of it?

Mr. Sanders: The obligations assumed by the taxpayer under the second agreement were merely a reshuffling of his obligations under the first agreement. They were a revision of the schedule of payments. They extended the payments beyond the possible remarriage of the wife. The agreement changed the custody provisions of the child. As the Court in the Second Circuit said in Newton versus Pedrick, when they were faced with somewhat of a smiliar situation in connection with payments made under a second agreement, the Court in that case stated that the [15] second agreement merely reshuffled the obligations and recast the obligations of the first agreement.

The Court: What do you mean "reshuffled"?

That is a term that is a little bit indefinite to me in relation to this sort of thing. I don't exactly follow what is meant, or the significance of the word. I think that a more apt term could be had if it is to impart any meaning here to me; I think it is a bad choosing. It is a bad choosing of a term, as far as I am concerned.

Mr. Sanders: The position of the Petitioner can be summed up in this way, your Honor: I believe that, clearly, the original obligation imposed upon Hollander under the 1946 Nevada decree and the earlier agreement was incident to the divorce; that the changes which were made by the 1948 agreement and the California decree, were merely changing the terms of payment, as far as their duration was concerned, and merely changing the custody of the child; and that as the first agreement——

The Court: What does the custody of the child have to do with this payment that is deductible or not deductible which is to go to the wife as alimony or for her support and maintenance? Because the statute very definitely cuts a line there, and there is no deduction provision allowed in case of support and maintenance of the child.

Mr. Sanders: I understand that, your [16] Honor.

The Court: So I just don't understand how the fact that there was something in this later agreement to do with the child, how that would have anything to do with the question here.

Mr. Sanders: Well, actually, I mention it only

for background material, and from Petitioners' point of view the fact of the wife's remarriage and the economic situation of her husband, and the fact that Mr. Hollander did get custody of the child, are immaterial. It is our position that, if the first agreement was incident to the divorce, that any modification or revision of that first agreement and decree would also be incident to the divorce, to the divorce and the status and decree of divorce.

The Court: It would be much easier to follow you on that argument, all right, if the payments weren't to extend after remarriage, and deliberately so.

Mr. Sanders: Well, your Honor——

The Court: I never heard of an alimony grant by any court which obligated a former husband to take care of a former wife after she remarried someone else who assumed that obligation.

Mr. Sanders: If the first agreement had so provided and the parties had agreed on these same terms in the first agreement, and that agreement had been adopted and incorporated by the Nevada court, certainly under those circumstances there would be no argument that the payments were not incident to the [17] divorce.

The Court: I hear you say that. What authority do you have for that, insofar as the payments after the remarriage?

Mr. Sanders: The Brown case, your Honor.

The Court: Was that the Brown case——

Mr. Sanders: That was concerned with those facts. In that case, the original agreement provided

for payments after remarriage and the Commissioner took the position in that case that, because the payments continued after remarriage, that they were not deductible under Section 22(k) and the Circuit Court rejected that argument. Also, in that connection, I point out to the Court I.T. 41081952-CB, 113, where the Commissioner himself was concerned with the question of deductibility of payments after remarriage, and in that, took the position that payments after remarriage were deductible under this section. So it has been the Petitioners' position that if the original agreement had contained the same provisions as the second agreement, that then there certainly would have been no argument.

The Court: There would be this difference, that this agreement—according to my understanding of the statements here—of course, I will look at the facts when I come to the matter of disposing of the case—that, as I followed it, this agreement, insofar as these payments are concerned, was not looking to divorce at all. It was looking at the remarriage [18] of the first wife.

Mr. Sanders: Your Honor, it is true that the facts of the remarriage of the wife were part of the motivating factors which went into the second agreement.

The Court: As far as the wife is concerned, what other factor did it have?

Mr. Sanders: I don't know, your Honor.

The Court: Laying aside the questions about the child, which could not determine this anyhow.

Mr. Sanders: I don't know, your Honor, because I have never spoken to Idy Hollander.

The Court: You would have to find them in the transaction.

Mr. Sanders: That is right, your Honor. And the only other factor or motivating factor would be the custody of the child, as far as I can see from the agreements. But it is petitioners' viewpoint and position that, if the first agreement was incident to the divorce, that the revision and modification of that agreement was also incident to divorce.

The Court: Well, I could see where that would be true if it had to do with matters that normally come within the range of the divorce, namely, the satisfaction of the obligation of the husband to care for a wife. It is not so clear to follow beyond, even though I hear you say so, and even though you tell me that the United States District Court [19] has held that it was, if that was, if that was a part of the agreement at the time of the divorce. Of course, there is this difference between that and this, and that is that that agreement was looking to the divorce, and this one, so far as I see now—I haven't heard anything which would tell me that this one was.

Mr. Sanders: Well, this one, as far as the matter of time, was clearly subsequent to the time.

The Court: Very well. Now, of course, this situation arose out of one that was brought about by the opinion of the Supreme Court in Douglas versus Wilkins, dealing in the principle that a person was not entitled to a deduction for paying his own obli-

gations, and an obligation incident to his marriage relationship.

Similarly, I can see where we wouldn't have had a different situation prior to 23(u) and 22(k) in this sort of thing, because it would probably have been regarded as being without consideration if it was looking to the remarriage and the paying of something that the man was not obligated to do in the first place.

Now, however, we do have a question of interpreting and applying the statute, and sometimes when Congress makes that change it goes outside the scope of those principles that have theretofore been applicable and which brought about the legislation itself. I may say that the Walsh case, and insofar as its [20] applicability here is concerned—and if it were, and as I understood from counsel for the Petitioner, it was his position that the Walsh case was a weaker case for the taxpayer, then I could pose this question to the Respondent. And that is that indicated by the history of the Walsh case. There, in an earlier year, as I recall, the Tax Court held that the prior—the second agreement did not fall within the statute, and that the first wife was in the clear, and that the items were not taxable to her, and therefore they were not deductible by the husband, and we were affirmed in the Court of Appeals in the District of Columbia.

Then we come along with the same case where the husband, the former husband, is seeking a deduction, and at the same time a case for certain years tried in this Court, a case for a different year

is tried in the District Court here, where the husband is seeking a refund, claiming that he was entitled to a deduction he didn't take. And while the matter was pending here, I mean pending before the Tax Court, the decision came out that the husband was entitled to the deduction within the statute, and then of course, not having decided the case, we looked with interest to see what the Respondent was going to do, because there was certainly a direct conflict in principle between the decision of the District Court and the decision of the Tax Court in the former wife's case, and the decision of the Court of Appeals affirming it. But somebody in the Government, whether [21] it was the Internal Revenue Service or the Department of Justice, sat on their hands and let the conflict rest. So there I assume that on the case law, neither Walsh nor the former wife was paying any tax on that income. Now, just why the Revenue Service or the Department of Justice would do that, I don't know. And yet we had no word in the Tax Court to the effect that they were not still pressing the matter for us, when, as a matter of fact, if we decided it in favor of the Government—and under our prior decision it would come right back to the Ninth Circuit, the same Court of Appeals to which the Government would have to appeal in the District Court case—well, as I say, I know that sometimes the Revenue Service does not have the final say. There is difficulty in clarifying and getting a settled interpretation of the law, when Justice refuses for some reason best

known to them to try to proceed to clear up things at the time.

Now, in this case, after I get some further facts, it appears that there is a difference between it and the Walsh case. Now, first—and this I say to Respondent's counsel and to Petitioners' counsel, both, but more particularly Respondent's counsel because I want it dealt within brief—to the extent that 22(k) and 23(u) are dealing with alimony, then I could follow certain reasoning, because I have never heard of an obligation where the obligation is imposed by a court to pay alimony was carried over and extended beyond the remarriage of [22] the spouse that was being supported. I don't know if there is any such obligation in the law which calls on a prior husband to support a former wife after she is remarried. I never heard of it. And I never heard of a court holding jurisdiction in an alimony payment to require it. If I am wrong in the law, in that analysis, I will expect counsel to clear it up for me.

The second point is, which is directed to the Petitioners' counsel more particularly, because it seems to me that that is where he must find the answer to the case in his favor, if it is to be found—and assuming that I am right on my idea of alimony, is to show me wherein, under the statute, Congress provided that a payment made under an agreement of this sort, looking to the remarriage of the former wife and not to divorce, is covered by 22(k) so as to be taxable to the former wife and deductible—

under 23(u) so as to be deductible by the former husband.

Now, I can say this, but it has little to do with the question of the language of the statute of the Congressional intent, unless Congress somewhere brought it in, but I think that in fairness to the former husband, if he is going to support the former wife after she has remarried, and the other husband has assumed the obligation to support her until death parts them, he ought to be willing to pay the tax on it. But that is not a question that we have here. We have a question of law and a question of determining what Congress intended. [23]

So I am going to expect you gentlemen, as good lawyers, to have all of that spelled out very simply and decisively for me in briefs. You will be allowed 90 days for briefs and 30 days for reply.

The case will stand submitted upon the filing of briefs.

Mr. Janes: Will they be simultaneous briefs?

The Court: Yes, and I want good reply briefs.

The Clerk: Ninety days for the original briefs, and 30 days.

The Court: If I get a good reply brief, I often find it of more help than I do the original briefs.

(Whereupon, at 2:55 o'clock p.m., the hearing in the above-entitled matter was closed.)

Filed May 16, 1955, T.C.U.S. [24]

[Title of Tax Court and Cause.]

DOCKET ENTRIES

1953

Nov. 30—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 1—Copy of petition served on General Counsel.

Nov. 30—Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 12/2/53—Granted.

1954

Jan. 26—Answer filed by General Counsel.

Jan. 28—Copy of answer served on taxpayer—Los Angeles, Calif.

1955

Feb. 8—Hearing set April 25, 1955—Los Angeles, Calif.

Apr. 26—Hearing had before Judge Turner on the merits, Appearance of Edward Sanders; and Stipulation of Facts filed at hearing, Appearance of Louis M. Brown, filed at hearing. Briefs due 90 days from April 26, 1955; Replies due 120 days from April 26, 1955.

May 16—Transcript of Hearing 4/26/55 filed.

July 8—Motion for extension of time to 8/25/55 to file brief, filed by taxpayer. 7/8/55—Granted.

July 19—Motion for extension of time to 8/25/55 to file brief, filed by General Counsel. 7/20/55—Granted.

1955

Aug. 23—Brief filed by taxpayer.

Aug. 25—Brief filed by General Counsel.

Sept. 19—Motion for extension to October 25, 1955, to file reply brief filed by taxpayer. 9/20/55—Granted.

Oct. 24—Reply Brief filed by taxpayer. Copy served.

Oct. 24—Reply Brief filed by General Counsel.

1956

July 17—Findings of Fact and Opinion filed. Judge Turner, Decision will be entered for the Respondent. Served 7/17/56.

July 18—Decision entered, Judge Turner, Div. 8. Served 7/19/56.

Oct. 5—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by petitioner.

Oct. 5—Notice of filing Petition for Review with proof of service thereon, filed.

Oct. 12—Designation of contents of record on review with proof of service thereon, filed.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 11, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Rec-

ord on Review," including exhibits 1-A thru 3-C, attached to the Stipulation of Facts and Respondent's exhibits D, E and F, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of October, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15357. United States Court of Appeals for the Ninth Circuit. Hans S. Hollander and Clemence Blum Hollander, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: November 2, 1956.

Docketed: November 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15357

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS

Comes now Hans S. Hollander and Clemence Blum Hollander, petitioners on review in the above-entitled cause, by their attorneys, Lawrence E. Irell, Louis M. Brown and Edward Sanders, and hereby state that they intend to rely upon the following points in this proceeding. The petitioners assign as error the following acts and omissions of The Tax Court of the United States:

(1) The finding that the payments under the Agreement of March 16, 1948, were not incident to the divorce is contrary to the evidence.

(2) The finding that the payments under the Agreement of March 16, 1948, were incident to Idy's remarriage to her new husband rather than the divorce from Hans S. Hollander is contrary to the evidence.

(3) The finding that the payments under the Agreement of March 16, 1948, were not in discharge

of a continuing obligation of support to a former wife arising out of the marital or family relationship.

(4) The failure to recognize the fact that on March 16, 1948, the date of the modifying agreement, Hans S. Hollander was under an existing and continuing legal obligation to support his former wife.

(5) The failure to take into account the fact that Idy Hollander had not remarried on March 16, 1948, the date of the modifying agreement, so that Hans S. Hollander's obligation to support his former wife was in full force and effect.

(6) The failure to give recognition to the March 16, 1948 Agreement, as continuing the support obligation of Hans S. Hollander.

(7) The failure to find that the payments made by Hans S. Hollander pursuant to the Agreement of March 16, 1948, were in discharge of a legal obligation imposed upon him under a decree of divorce and under a written instrument incident to the divorce.

(8) The failure to find that the payments made by Hans S. Hollander to his former wife during 1948 and 1949 were in discharge of a legal obligation arising out of the marital or family relationship.

(9) Disregarding the order of the Superior Court in and for the County of Los Angeles, State of California.

(10) The finding of deficiency in income taxes for the calendar years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58.

LAWRENCE E. IRELL,
LOUIS M. BROWN and
EDWARD SANDERS,
Counsel for Petitioners;

By /s/ LOUIS M. BROWN;

By /s/ EDWARD SANDERS.

[Endorsed]: Filed November 9, 1956, U.S.C.A.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HANS S. HOLLANDER and CLEMENCE BLUM HOLLANDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

Pleadings and Jurisdictional Facts.

On November 30, 1953, the above named petitioners filed their Petition in the Tax Court of the United States for redetermination of the deficiencies in income tax for the taxable years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58. Petitioners alleged that the payments of petitioner Hans S. Hollander to his former wife, Idy, were deductible under Section 23(u) of the Internal Revenue Code of 1939 and that the Commissioner of Internal Revenue erred in denying such deduction. [R. 3-13.]

An Answer was filed in the Tax Court on January 26, 1954. [R. 13-14.]

A Stipulation of Facts was filed in the Tax Court on April 26, 1955 [R. 14-43], and on which day hearing was held before the Tax Court sitting in Los Angeles, California. [R. 69-89.]

Following the promulgation of Findings of Fact and Opinion [R. 43-63], the Tax Court entered its decision on July 18, 1956, that there are deficiencies of $6,866.59 and $3,947.58 for the taxable years 1948 and 1949, respectively. [R. 63-64.]

Petition to review by this Court of said decision was filed October 5, 1956. [R. 64-68]. Said Petition was docketed on November 9, 1956 [R. 92], and the Statement of Points [R. 93-95] and Designation of Contents of Record on Review were filed on October 12, 1956. [R. 91.]

This Court has jurisdiction pursuant to Section 7482(b)(1) of the Internal Revenue Code of 1954 (Section 1141(b)(1) of the Internal Revenue Code of 1939).

Statement of the Case.

This controversy involves the proper determination of the petitioners' liability for federal income taxes for the calendar years 1948 and 1949. Petitioners, from and after August 5, 1948, were husband and wife and filed joint federal income tax returns for the calendar years 1948 and 1949. [R. 15.] Petitioner Hans S. Hollander was previously married to Idy Hollander [R. 15], and the case raises the issue of whether alimony payments made by Hans S. to Idy Hollander were properly deducted by petitioners on their joint federal income tax returns for the calendar years 1948 and 1949. The statutory provisions on which this controversy hinges are Sections 22(k)

and 23(u) of the Internal Revenue Code of 1939 (set out in Appx. A), which Sections state that periodic alimony payments are includible in a divorced wife's income and deductible by a divorced husband when such payments are made to the former wife in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship and are made pursuant to a decree or a written instrument incident to such divorce or separation.

Hans S. Hollander was married to Idy Hollander on September 30, 1937. [R. 15.] On March 6, 1946, in contemplation of divorce, Hans and Idy Hollander entered into a property settlement agreement. [R. 15.] Under the terms of this agreement Hans S. Hollander agreed to pay Idy Hollander during her lifetime a maximum of $10,000.00 annually for her support and maintenance until her death or remarriage, agreed to name Idy as beneficiary of certain life insurance policies, and agreed to award Idy sole legal custody of the only child of the marriage. [R. 19-31.] Shortly thereafter, Idy Hollander, then a resident of the State of Nevada, instituted divorce proceedings against Hans S. Hollander; and on June 12, 1946, the Nevada Court entered its Decree of Divorce, and incorporated the aforesaid property settlement agreement of March 6, 1946, as part of its decree and ordered Hans S. Hollander to comply with the terms of said agreement. [R. 16.] The Commissioner of Internal Revenue does not question that the payments under this original decree and agreement were incident to the divorce and properly deductible by Hans S. Hollander under Section 23(u) of the Internal Revenue Code of 1939. [R. 18-19.]

On March 16, 1948, at a time when the obligations under the original 1946 property settlement agreement were in full force and effect, Hans S. and Idy Hollander entered into an agreement modifying these obligations. [R. 16.] This modifying agreement was bargained for and supported by legal consideration in the form of mutual promises. The negotiations leading to the modifying agreement were precipitated by Idy Hollander's desire to marry a "relatively impecunious individual." [R. 16-17.] In order to "enable" herself to remarry, Idy agreed to the following legal detriments: (a) reduction in the amount of payment to be given to her annually; (b) termination of all payments after a short specified period of years rather than a continuation of payments for an indefinite period, potentially measured by her natural life; (c) substitution of the child for Idy as beneficiary of the insurance policies; and (d) granting to Hans S. Hollander sole legal custody of the child. In return for these legal benefits, Hans S. Hollander agreed to pay the reduced annual amount to Idy for a specified period of years, whether or not she remarried. [R. 31-41.] This agreement of March 16, 1948, was subsequently incorporated into a decree of the Superior Court of the State of California, which ordered Hans S. Hollander to comply with the terms of the agreement of March 16, 1948. [R. 17, 42-43.] Idy Hollander remarried 13 days after the execution of the modifying agreement. [R. 17.]

The Commissioner of Internal Revenue denied deduction of payments made by Hans S. Hollander under this modifying agreement following Idy's remarriage, and the Tax Court sustained the Commissioner on the grounds

that the first property settlement agreement was a "final" settlement and not subject to modification [R. 61], and because the 1948 agreement was incident to Idy's remarriage rather than incident to the divorce of Hans S. and Idy Hollander. [R. 62.]

The Tax Court's opinion is based upon a pre-occupation with matters which have no relevance to the issues raised by the facts and the applicable rules of law. The two ultimate facts in this case are: one, that the 1948 modifying agreement and decree were incident to the divorce of Hans S. and Idy Hollander because they revised the 1946 agreement and decree which were incident to the divorce; and, two, that the payments made under the 1948 agreement and decree, being in discharge of Hans S. Hollander's continuing support obligation imposed by the 1946 agreement and decree, were payments in discharge of an obligation arising out of the marital or family relationship.

Despite the Tax Court's finding that the 1946 agreement and decree were unalterable because "final" in language, such agreement and decree were at all times subject to valid modification by the mutual consent and agreement of the parties. Further, Idy Hollander's remarriage took place 13 days *after* the execution of the 1948 agreement and, consequently, was both without effect on Hans S. Hollander's continuing alimony obligation and irrelevant to this controversy. On March 16, 1948, at the time when this modifying agreement was entered, Idy Hollander had not remarried, and conceivably, might never have remarried. [R. 17.] Further, at the time when this modifying agreement was entered Hans S. Hollander was under a binding legal obligation to support his former

wife, Idy, which obligation could only be altered by Idy Hollander's death, or by Idy Hollander's remarrying, or by Idy Hollander's agreeing to an alteration. The first two contingencies not having taken place on March 16, 1948, Hans S. Hollander's ability to modify his alimony obligation and obtain the legal custody of his child was dependent upon securing the consent of Idy Hollander. This he did by entering into an agreement that was bargained for and supported by traditional legal consideration. Hans S. Hollander might have refused to agree to modify the original settlement terms and might have waited to see if Idy would end his obligation by remarrying in any event. But Hans S. Hollander had no assurance that Idy would ever remarry. The Commissioner of Internal Revenue has never argued otherwise; and, indeed, the inference to be drawn from the stipulated fact that the modifying agreement "enabled" Idy Hollander to remarry [R. 17] is that Idy would not have been able to remarry without such modification. At any rate, the record is barren of any evidence which would justify the Commissioner of Internal Revenue or the Tax Court as treating the modification agreement in the same manner as if it had been executed after Idy Hollander had remarried and had rejuvenated an obligation that had been discontinued by such remarriage, which is the position upon which the Tax Court's decision seems to be based.

To conclude, at all times pertinent to this controversy, Hans S. Hollander has made alimony payments pursuant to binding contractual obligations and judicial decrees ordering such payments, which payments were properly included by Idy Hollander in her gross income [R. 18] and deductible by Hans S. Hollander.

Specification of Errors.

The petitioners assign as error the following acts and omissions of the Tax Court of the United States:

(1) The finding that the payments under the agreement of March 16, 1948, were not incident to the divorce of Hans S. and Idy Hollander.

(2) The finding that the payments under the agreement of March 16, 1948, were incident to Idy's remarriage to her new husband rather than the divorce from Hans S. Hollander.

(3) The finding that the payments under the agreement of March 16, 1948, were not in discharge of a continuing obligation of support to a former wife arising out of the marital or family relationship.

(4) The failure to recognize the fact that on March 16, 1948, the date of the modifying agreement, Hans S. Hollander was under an existing and continuing legal obligation to support his former wife.

(5) The failure to take into account the fact that Idy Hollander had not remarried on March 16, 1948, the date of the modifying agreement, so that Hans S. Hollander's obligation to support his former wife was in full force and effect.

(6) The failure to give recognition to the March 16, 1948 agreement, as continuing the support obligation of Hans S. Hollander.

(7) The failure to find that the payments made by Hans S. Hollander pursuant to the agreement of March 16, 1948, were in discharge of a legal obligation imposed upon him under a decree of divorce and under a written instrument incident to the divorce.

(8) The failure to find that the payments made by Hans S. Hollander to his former wife during 1948 and 1949 were in discharge of a legal obligation arising out of the marital or family relationship.

(9) Disregarding the order of the Superior Court in and for the County of Los Angeles, State of California.

(10) The finding of deficiency in income taxes for the calendar years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58.

Summary of the Argument.

I.

THE 1948 MODIFYING AGREEMENT AND DECREE WERE INCIDENT TO THE DIVORCE OF HANS S. HOLLANDER AND IDY HOLLANDER BECAUSE THEY WERE A REVISION OF THE 1946 AGREEMENT AND DECREE WHICH WERE INCIDENT TO THE DIVORCE.

II.

PAYMENTS MADE UNDER THE 1948 AGREEMENT WERE IN DISCHARGE OF AN OBLIGATION ARISING OUT OF THE MARITAL OR FAMILY RELATIONSHIP BECAUSE, WHERE A DIVORCED HUSBAND IS UNDER A CONTINUING OBLIGATION TO SUPPORT HIS FORMER WIFE, IMPOSED BY DECREE OR AGREEMENT INCIDENT TO DIVORCE, ANY PAYMENTS MADE TO DISCHARGE THIS OBLIGATION ARE PAYMENTS MADE IN DISCHARGE OF AN OBLIGATION ARISING OUT OF THE MARITAL RELATIONSHIP, EVEN IF THE OBLIGATION IS REVISED BY AN AGREEMENT SUBSEQUENT TO THE DIVORCE.

III.

THE TAX COURT, WHEN IT FOUND THAT THE SECOND AGREEMENT COULD NOT BE INCIDENT TO THE DIVORCE OF THE PETITIONER AND IDY BECAUSE THE SECOND AGREEMENT WAS INCIDENT TO IDY'S REMARRIAGE, COMMITTED ERROR BECAUSE IT INTRODUCED INTO THE STATUTE AN ADDITIONAL AND IRRELEVANT CONDITION FOR FINDING THAT THE SECOND AGREEMENT WAS INCIDENT TO DIVORCE.

IV.

THE TAX COURT COMMITTED ERROR WHEN IT TREATED THE 1946 DECREE AND AGREEMENT AS UNALTERABLE BY MUTUAL AGREEMENT BECAUSE HANS S. HOLLANDER'S CONTINUING MARITAL OBLIGATION UNDER THE ORIGINAL 1946 AGREEMENT AND DECREE WAS SUBJECT TO A VALID MODIFICATION BY MUTUAL AGREEMENT EVEN THOUGH THE 1946 AGREEMENT PURPORTED TO BE A "FINAL" SETTLEMENT.

V.

THE MODIFYING AGREEMENT OF 1948 CONTINUED ON WITHOUT INTERRUPTION HANS S. HOLLANDER'S MARITAL OBLIGATION BECAUSE IT WAS BARGAINED FOR AND VALID LEGAL CONSIDERATION IN THE FORM OF MUTUAL PROMISES SUPPORTED IT. IDY HOLLANDER'S REMARRIAGE 13 DAYS AFTER THE EXECUTION OF THE MODIFYING AGREEMENT OF 1948 WAS BOTH WITHOUT EFFECT UPON HANS S. HOLLANDER'S CONTINUING OBLIGATION OF SUPPORT AND IRRELEVANT TO THIS CONTROVERSY.

VI.

THE OPINION OF THE TAX COURT IS INCONSISTENT WITH LEGISLATIVE POLICY BECAUSE IT PREVENTS TAXPAYERS FROM ADJUSTING THEIR MARITAL OBLIGATIONS IN THE LIGHT OF CHANGING CIRCUMSTANCES.

ARGUMENT.

I.

The 1948 Modifying Agreement and Decree Were Incident to the Divorce of Hans S. Hollander and Idy Hollander Because They Were a Revision of the 1946 Agreement and Decree Which Were Incident to the Divorce.

Periodic alimony payments are deductible by a divorced husband (and includible in the former wife's gross income) when such payments satisfy two major statutory requirements: one, that the payments are made pursuant to a decree or a written instrument incident to such divorce or separation; and, two, that the payments are made to the former wife in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship. (See Argument II.) Sections 22(k) and 23(u) of Internal Revenue Code of 1939. (set out in Appx. A.)

For a number of years, the courts had difficulty with the proper interpretation of the clause "incident to such divorce" and struggled with the question of whether this term should be construed narrowly as referring only to the decree of divorce or more broadly as referring to any written arrangements related to the status of divorce. See *Jane C. Grant v. Commissioner,* 209 F. 2d 430 (2d Cir. 1954), affirming 18 T. C. 1013 (1952); *Commissioner v. Dorothy B. Smith,* 192 F. 2d 841 (1st Cir. 1951), affirming 16 T. C. 639 (1951). This question has now been resolved and the courts, in order to fully effectuate the purposes of the statute, have concluded

that the phrase "incident to such divorce" in Section 22(k) refers to the status of divorce rather than to merely the decree of divorce; that the term "written instrument incident to such divorce or separation" was only designed to insure adequate proof of the existence of the obligation when divorce has occurred. *Newton v. Pedrick,* 212 F. 2d 357 (2nd Cir. 1954), reversing 115 Fed. Supp. 368 (S.D.N.Y. 1953); *Maurice Fixler,* 25 T. C. 1312 (1956), Acq. 1956 Int. Rev. Bull. No. 33, 5. Thus, it has now been frequently held that if an existing agreement that was incident to divorce is modified, the modifying agreement is itself incident to divorce. *Newton v. Pedrick, supra; Dorothy B. Smith v. Commissioner, supra; Jane C. Grant v. Commissioner, supra; Antoinette L. Holahan v. Commissioner,* 222 F. 2d 82 (2nd Cir. 1955), affirming 21 T. C. 451 (1954); *Walsh v. Westover,* ..... Fed. Supp. ..... (S.D. Calif. 1953), 53-1 U. S. T. C. para. 9283; *Raoul Walsh,* 21 T. C. 1063 (1954), Acq. 1954-2 Cum. Bull. 6; *Maurice Fixler, supra* (first agreement oral not written); *Rowena S. Barnum,* 19 T. C. 401 (1953); *Cf., George R. Joslyn v. Commissioner,* 230 F. 2d 871 (7th Cir. 1956), reversing in part and affirming in part 23 T. C. 126 (1954); *Jessica S. Mahana,* 88 Fed. Supp. 285 (Ct. Cl. 1950), cert. denied 339 U. S. 978 (1950).

The applicable rule of law is as the Court of Appeals for the Second Circuit stated in its holding in *Newton v. Pedrick, supra:*

> ". . . where a legal obligation to support survives the dissolution of the marital relationship whether

> because of imposition in the divorce decree itself or because of a pre-decree agreement not incorporated in the decree, subsequent adjustment of that obligagation by a court order or by later agreement is 'incident to such divorce' within the purview of the statute." (212 F. 2d 358 at 361-362.)

On March 16, 1948, Hans S. Hollander was under a continuing obligation to support his former wife, Idy. This obligation was imposed by a decree of divorce and an agreement incident to divorce and was an obligation arising out of the family or marital relationship. The Commissioner of Internal Revenue does not question that payments under this original agreement were properly deducted by petitioners.

On March 16, 1948, Hans S. Hollander and his former wife, Idy, revised the form of Hans S. Hollander's continuing support obligation by an agreement which was bargained for and supported by valid legal consideration, and which agreement was subsequently incorporated into a judicial decree. [R. 16-17.]

As the March 16, 1948, agreement revised the 1946 decree and written agreement which was incident to divorce, at a time when the obligations under the 1946 agreement were in full force and effect, the 1948 agreement was incident to divorce and the payments pursuant to it were deductible.

II.

Payments Made Under the 1948 Agreement Were in Discharge of an Obligation Arising Out of the Marital or Family Relationship Because, Where a Divorced Husband Is Under a Continuing Obligation to Support His Former Wife, Imposed by Decree or Agreement Incident to Divorce, Any Payments Made to Discharge This Obligation Are Payments Made in Discharge of an Obligation Arising Out of the Marital Relationship, Even if the Obligation Is Revised by an Agreement Subsequent to the Divorce.

In addition to the much litigated requirement that alimony payments be made pursuant to a decree or written instrument "incident to such divorce," Sections 22(k) and 23(u) (set out in Appx. A), contain the second requirement that payments to be deductible must be "in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by" the divorced husband. Legislative history indicates that the legal obligation to which the statute refers must be in recognition of the general obligation to support the former wife. See Sen. Rep. No. 1631, 77th Cong., 2d Sess. 84 (1942); *Newton v. Pedrick,* 212 F. 2d 357 at 361.

The courts have held that where a divorced husband is under a continuing obligation to support his former wife imposed by decree or agreement incident to divorce, any payments made in discharge of this obligation are payments made in discharge of an obligation arising out of the marital or family relationship, even if the obliga-

tion is revised by an agreement subsequent to the divorce. *Newton v. Pedrick, supra; Dorothy B. Smith v. Commissioner, supra; Jane C. Grant v. Commissioner, supra; Antoinette L. Holahan v. Commissioner, supra; Walsh v. Westover, supra; Raoul Walsh, supra; Rowena S. Barnum, supra; Cf., Maurice Fixler, supra; George R. Joslyn v. Commissioner, supra; Jessica S. Mahana, supra.* The courts have reached this conclusion because:

> "there is nothing in the statute or legislative background which suggests that it was intended that the equitable distribution of the tax burdens resulting from the adjustment of marital or family financial obligations in connection with a dissolution of the marriage relationship, which the statute aimed to achieve, should be limited to those arrangements effected at the time of decree of divorce or separation, without regard to their possible future rearrangement in consequence of later and perhaps unforseen vicissitudes." (*Newton v. Pedrick,* 212 F. 2d 357 at 361.)

Thus, because on March 16, 1948, Hans S. Hollander's obligation of support under the 1946 agreement and decree, which obligation clearly and unquestionably arose out of the family or marital relationship, was in full force and effect, the modification of that continuing support obligation retained the same tax characteristics as the original obligation and arose out of the family or marital relationship.

The facts of one of the leading cases in this area are sufficiently close to the facts of the instant case to suggest their elaboration. This is the case of *Newton v. Pedrick, supra,* where the Court of Appeals for the Second Circuit permitted a husband to deduct payments made to

his wife after her remarriage under a modified support agreement. In that case, a husband and wife entered into an agreement in 1924 in contemplation of divorce. The 1924 agreement provided for the support of the wife and children by providing that the wife would receive $24,000.00 a year until her death or remarriage, and that upon her remarriage she would receive $14,000.00 a year, plus $5,000.00 for each child. On August 25, 1926, the wife remarried. In 1928, the agreement was modified to provide for divided custody of the children and an *additional* $6,000.00 per year to be paid to the ex-wife. In 1930, another agreement was entered into giving the husband sole custody of the children and cancelling the 1928 agreement and restoring the 1924 agreement as it originally stood, providing, that the husband was required to pay the ex-wife $11,000.00 per year *in addition to* the payments due under the 1924 agreement. The Court held the payments under the 1930 agreement were deductible by the husband.

Several aspects of the *Newton v. Pedrick* decision are worth emphasis. In *Newton v. Pedrick,* the wife had already remarried at the time the modifying agreement was entered; the husband's original 1924 obligation to make the larger payments, $24,000.00 per year, required until a remarriage by the wife, had already been reduced by the remarriage of the wife to $14,000.00 per year, at the time the 1930 modifying agreement was executed. In the instant case, Idy Hollander had not remarried, and most crucially, might never have remarried so as to end Hans S. Hollander's obligation to make the larger payments required until a remarriage by his ex-wife. In *Newton v. Pedrick,* the 1928 modifying agreement increased the divorced husband's payments to $20,000.00 per

year; the 1930 agreement further increased the payments to $25,000.00 per year. In *Newton v. Pedrick,* the payments under the modifying agreement were unquestionably *in addition to* the amounts the husband was obligated to pay under the original 1924 agreement. In the instant case, the payments under the modifying agreement by Hans S. Hollander reduced both the annual amount of the continuing obligation and the likely duration of such payments. In short, in line with *Newton v. Pedrick,* the instant case clearly falls within the well established principle of law applicable to this case.

III.

The Tax Court, When It Found That the Second Agreement Could Not Be Incident to the Divorce of the Petitioner and Idy Because the Second Agreement Was Incident to Idy's Remarriage, Commtted Error Because It Introduced Into the Statute an Additional and Irrelevant Condition for Finding That the Second Agreement Was Incident to Divorce.

No court previously has analyzed the problem of deductibility of periodic alimony payments under a modifying agreement except in terms of whether the modifying agreement was "incident to such divorce." *Newton v. Pedrick, supra; Dorothy B. Smith v. Commissioner, supra; Jane C. Grant v. Commissioner, supra; Antoinette L. Holahan v. Commissioner, supra; Walsh v. Westover, supra; Raoul Walsh, supra; Maurice Fixler, supra; Rowena S. Barnum, supra; Cf., George R. Joslyn v. Commissioner, supra; Jessica S. Mahana, supra.* If the modifying agreement is "incident to such divorce," *i. e.,* related to the status of divorce, then until now it has been irrelevant what other things the modification is incident to or related

to. In this respect, the Tax Court committed error by finding that "the second agreement was not incident to the divorce of petitioner and Idy, but incident to Idy's remarriage." [R. 62.]

Perhaps, from Idy's standpoint, her motive in modifying the original agreement was principally related to her possible remarriage. But because Idy (or even Idy and Hans S. Hollander), had as her (their) motive for agreeing to a modifying agreement her possible remarriage does not mean that such agreement could not also be incident to the prior divorce of Idy and Hans S. Hollander. And, more importantly, if the modifying agreement was incident to such prior divorce, then it could not be material or relevant what else such agreement was incident or related to, or what other motives the taxpayers had. Surely, there is no statutory requirement that a modifying agreement be incident to the divorce and only incident to the divorce; that such agreement not be incident to or related to anything else. It would be unrealistic and unduly harsh to require parties to be so single minded in their subjective motives. Yet, this is what the Tax Court appears to demand.

By stating that the modifying agreement was "incident to Idy's remarriage" [R. 62], the Tax Court demonstrated a misconstruction of the problem of the case and a confusion of the ultimate fact for the Court's determination. The ultimate fact in a case involving a modifying agreement, is as the Court of Appeals for the Second Circuit in *Newton v. Pedrick, supra,* held:

> ". . . where a legal obligation to support survives the dissolution of the marital relationship . . ., subsequent adjustment of that obligation by a court

order or by later agreement as the case may be, is 'incident to such divorce' within the purview of the statute." (212 F. 2d 357 at 361-362.)

That Court also said:

"The fact that increased support for the wife may have given the husband an opportunity to adjust the custody arrangements hardly proves that the motive for the 1930 Property Agreement (the modifying agreement) was other than a 'marital' or 'family' one." (212 F. 2d 357 at 360.)

The Tax Court in this case should have centered its inquiry on whether the modifying agreement was incident to divorce and made that the pivotal issue. If the issue of whether the modifying agreement was incident to divorce had been properly delineated from incidental factors, such as the parties' subjective motives, it would have been necessary to decide that the 1948 modifying agreement and decree were incident to the divorce of Hans S. and Idy Hollander because they were a revision of the 1946 agreement and decree which were incident to the divorce.

The same sort of distinction as the distinction on which the Tax Court based its decision in this case, prompted the Second Circuit Court of Appeals to exasperatedly declare that:

". . . our repeated decisions on this subject have been founded upon principles which make irrelevant such incidental matters as those now held by the Tax Court to be decisive." (*Harold Holt v. Commissioner,* 226 F. 2d 757 at 758 (2nd Cir. 1955), reversing 23 T. C. 469 (1954), cert. denied 350 U. S. 982 (1956).)

IV.

The Tax Court Committed Error When It Treated the 1946 Decree and Agreement as Unalterable by Mutual Agreement Because Hans S. Hollander's Continuing Marital Obligation Under the Original 1946 Agreement and Decree Was Subject to a Valid Modification by Mutual Agreement Even Though the 1946 Agreement Purported to Be a "Final" Settlement.

The Tax Court, while seeming to accept the principle that "where a divorced husband is under a continuing obligation to support his former wife, imposed by a decree or agreement incident to divorce, any payments made to discharge this obligation are payments made in discharge of an obligation arising out of the marital or family relationship, even if the obligation is revised by an agreement subsequent to divorce" [R. 59], sought to make that principle inapplicable to the instant case on the ground that there was no "continuing obligation" which could be modified in the instant case because the original agreement purported to be a "final" one. [R. 59-61.]

In this regard, the Tax Court went to great lengths in its opinion to distinguish the instant case from the case of *Dorothy B. Smith v. Commissioner, supra,* where the modifying agreement was held incident to the divorce. The Tax Court said:

> "Unlike the 1937 agreement in the *Smith* case, the 1946 agreement here did not leave open the final disposition of the amount of support to which petitioner's former wife could be entitled." [R. 60-61.]

Although there is some supporting dictum in the *Smith* case for the Tax Court's assertion, see 192 F. 2d 841 at 844, the Tax Court's distinction appears to be based upon an erroneous reading of the *Smith* case. In the *Smith* case, husband and wife entered into an agreement in 1937 whereby the wife was to receive $12,000.00 annually as alimony and for child support until she (1) died, (2) remarried, or (3) the child of the marriage reached twenty-one. Whenever the first of these three events occurred, the parties agreed to modify their agreement. The 1937 agreement then went on to say: "Except as herein provided, neither party shall apply to any Court for the modification of the provisions of this paragraph with respect to such monthly payments." (16 T. C. 639 at 640.) In 1944, at which time none of the aforementioned contingencies had occurred, the wife sought to obtain court enforcement of the husband's obligation to make payments, and the husband sought modification of the original agreement. A new agreement was subsequently entered into to reduce the amount of the husband's payments to the wife and providing for separate payments for the children. Under the terms of the original agreement, modification was only left open upon the happening of the three specified contingencies referred to above; in all other respects, the first agreement was to be final. At the time that the modification was agreed upon, none of these contingencies had taken place; thus the original agreement was in effect modified at a time when it was supposedly final, just as in the instant case; and the modification took place by mutual agreement, just as in the instant case.

None of the following cases, all of which hold payments by a husband under a revised agreement to be deductible, inquire into whether the original agreement purported to be a "final" one or only a tentative settlement. *Newton v. Pedrick, supra; Jane C. Grant v. Commissioner, supra; Antoinette L. Holahan v. Commissioner, supra; Walsh v. Westover, supra; Raoul Walsh, supra; Rowena S. Barnum, supra.*

The reason the foregoing cases were not concerned with purported "finality" is that the language of finality in a settlement agreement is used only to prevent harassment of one party by unilaterial petition on the part of the other party to a court to upset the mutually agreed upon arrangement of the parties. The merit of having such a finality provision in an agreement is that it gives the parties certainty in their parting arrangements. However, changing circumstances frequently dictate renegotiating the terms of a purportedly "final" settlement. In such situations, because of the inability of either party to revise the parting arrangements upon a unilaterial petition to a court, it becomes very important from the standpoint of public policy to allow revision in the light of changed circumstances upon the mutual consent and agreement of the parties. This the Tax Court would deny. And this the Superior Court of the State of California recognized when it ordered Hans S. Hollander to make payments under the modifying agreement of 1948. [R. 17, 42-43.] To conclude, even a purportedly "final" agreement is subject to a valid modification by mutual agreement.

V.

The Modifying Agreement of 1948 Continued on Without Interruption Petitioner Hans S. Hollander's Marital Obligation Because It Was Bargained for and Valid Legal Consideration in the Form of Mutual Promises Supported It. Idy Hollander's Remarriage 13 Days After the Execution of the Modifying Agreement of 1948 Was Both Without Effect Upon Hans S. Hollander's Continuing Obligation of Support and Irrelevant to This Controversy.

The Tax Court in its opinion seems to treat the 1948 agreement as being unsupported by legal consideration on the ground that there was no evidence "that Idy would not remarry unless petitioner acquiesced in continuing the alimony payments" [R. 62] and on the ground that Hans S. Hollander had already obtained informal custody of the child. [R. 62.] This position of the Tax Court misconstrues the problem. It is not significant what Idy Hollander would have done in the event Hans S. Hollander did not agree to the modifying agreement. Only if Idy Hollander had remarried *prior* to March 16, 1948, could such remarriage have been relevant to the problem of consideration, for then Hans would have been relieved of any continuing obligation to support her. If Idy Hollander had already remarried when the modifying agreement was executed, then the Tax Court would have been justified in treating the facts as if Hans S. Hollander reassumed obligations of which he had been relieved or assumed additional burdens which had never before existed. But such treatment must be considered error when the facts are to the contrary—on March 16, 1948, Idy Hollander had not remarried and might never have remarried. [R. 16-17.] On March 16, 1948, Hans S.

Hollander's continuing obligation to support Idy Hollander for the rest of her natural life was unimpaired and in full force and effect. Even though petitioner knew that Idy Hollander was strongly considering remarriage, it was a fact that on March 16, 1948, Idy Hollander had not only not remarried, but might never have remarried for any number of reasons. Compare *E. Ellsworth Baker v. Commissioner,* 205 F. 2d 369 at 370 (2nd Cir. 1953), affirming in part and reversing in part 17 T. C. 1610 (1952), (discussing unpredictability of wife's remarriage). Possibly, Idy's prospective husband, or Idy herself, might have died or have been killed in an accident. Even more likely, the prospective husband, or Idy Hollander herself, may have had a change of heart and decided not to remarry. Indeed, the facts stipulate that Hans S. Hollander agreed to the 1948 modifying agreement in order to "enable" Idy's remarriage. [R. 17.] The logical inference to be drawn from this fact and the fact that the prospective husband was "relatively impecunious" [R. 16] is that Idy could *not* and would *not* have remarried unless Hans S. Hollander agreed to this modification and that Hans S. Hollander would have had to support Idy Hollander for the rest of her natural life.

As of March 16, 1948, Hans S. Hollander could only be relieved from his fully enforceable support obligation by securing Idy's consent to relief or by an act (Idy's remarriage) over which Hans had no control and which was entirely within the discretion of two independent parties, Idy and her prospective husband. Thus, the 1948 agreement was the result of a bargained for exchange of mutual promises which saw both parties suffering legal detriments as promisors and receiving legal benefits as promisees. Idy Hollander agreed to the following legal

detriments: (a) reduction in the amount of payment to be given to her annually; (b) termination of all payments after a short specified period of years rather than a continuation of payments for an indefinite period, potentially measured by her natural life; (c) substitution of the child for Idy as beneficiary of the insurance policies, and (d) granting to Hans S. Hollander sole legal custody of the child. In return for these legal benefits, Hans S. Hollander agreed to pay the reduced annual amount to Idy for a specified period of years, whether or not she remarried. [R. 31-41.]

Hans S. Hollander did not reassume any obligations of which he had been relieved because on March 16, 1948, he had been relieved of none of his obligations under the 1946 agreement and decree. [R. 16-17.] Nor can it be said his obligations were voluntarily assumed burdens in the nature of a mere gratuity. As has been shown, the 1948 agreement was bargained for and supported by valid legal consideration.

The error in the Tax Court treatment of the consideration issue becomes even more evident when considering the point of whether securing legal custody of the only child constituted a part of the consideration for the modifying agreement of 1948. The Tax Court in the Hollander case disregarded this facet of the bargain, saying: "That agreement did no more than formalize what had already been accomplished in fact by the parties many months prior to the making of that agreement." [R. 62.] But the fact remains that until Hans S. Hollander received legal custody of the child, the informal arrangement whereby he had temporarily obtained custody of the child could have been upset and Idy Hollander

could have regained actual custody of the child at any time she so desired. Legal custody of the child was not a mere matter of form without substance as the Tax Court implied. It means Hans S. Hollander's securing the right to keep his daughter on a permanent basis rather than under a tentative arrangement which Idy Hollander could unilaterally upset.

The case of *Newton v. Pedrick, supra,* is strikingly similar to the instant case in the identity of its facts on this issue and the contrariness of the Tax Court's present decision to that of the Court of Appeals for the Second Circuit. In the *Newton v. Pedrick* case, the wife had already remarried so that securing legal custody of the children was the sole consideration received by the husband for his agreement to pay the former wife *additional* amounts for her support. That Court did not cast aside the significance of securing legal custody but viewed it as an integral part of the "re-shuffling" of the parting marital and family relationship. (212 F. 2d 357 at 360.) The *Newton* case would, indeed, be authority for finding the transfer of legal custody of the child as sufficient consideration in and of itself for Hans S. Hollander's promise to make payments after Idy's remarriage, even if Hans S. Hollander's promise had taken place after and not before, as it in fact did, the remarriage of Idy Hollander. In *Newton,* the wife had remarried and only the transfer of child custody kept the *additional* payments by the husband from being a gratuity.

In addition, as further consideration, Hans S. Hollander obtained the right to substitute his daughter in place of Idy as beneficiary of certain life insurance policies.

To conclude, the modifying agreement was bargained for and supported by traditional legal consideration.

VI.

The Opinion of the Tax Court Is Inconsistent With Legislative Policy Because It Prevents Taxpayers From Adjusting Their Marital Obligations in the Light of Changing Circumstances.

If the position of the Tax Court is sustained, a great many taxpayers having parted company under alimony agreements would be frozen in their position under such agreement. According to the Tax Court, when Idy Hollander approached Hans S. Hollander to renegotiate their separation agreement, Hans S. Hollander should have refused to consider reducing his present obligation through bilateral agreement because unilateral voluntary action on the part of Idy *might* some time in the future end his obligation entirely. [R. 62.] According to the Tax Court, Hans S. Hollander could only consent to reducing his obligation if he could later prove Idy Hollander would not remarry without his consent to a new agreement. [R. 62.] It is submitted this test imposes an unreal burden upon taxpayers. How was Hans S. Hollander to determine that Idy would remarry regardless of his agreement to a modification? What justification is there to place the burden on Hans S. Hollander to determine whether Idy would remarry regardless of his consent to a modifying agreement? What makes the Tax Court believe that Idy Hollander herself knew if she would remarry if Hans S. Hollander would refuse to modify the terms of the original agreement? One of the pivotal factors in Idy's decision to remarry was probably the ability to procure Hans S. Hollander's consent to

a modifying agreement. Indeed, in point of fact, once having been able to successfully bargain for Hans S. Hollander's agreement to a modification, Idy Hollander never had to face the ultimate issue, according to the Tax Court, of whether she would remarry even without modified alimony provisions. The Commissioner has not shown otherwise.

As the Second Circuit said in *Newton v. Pedrick, supra:*

> "There is nothing in the statute or its legislative background which suggests that it was intended that the equitable distribution of the tax burdens resulting from the adjustment of marital or family financial obligations in connection with the dissolution of the marriage relationship, which the statute aimed to achieve, should be limited to those arrangements effected at the time of a decree of divorce or separation, without regard to possible future rearrangement in consequence of later and perhaps unforeseen vicissitudes." (212 F. 2d 357 at 361.)

The Court of Appeals for the Ninth Circuit has recognized the broad construction of, and the overall policy to be implemented by, Sections 22(k) and 23 (u) of the Internal Revenue Code of 1939; in reversing the Tax Court in another case where the Tax Court held an agreement not to be incident to divorce, this Court stated:

> "The restricted interpretation given the statutory phrase by the Tax Court would tend, we believe, to defeat in many instances the legislative purpose." (*Commissioner v. Cecil A. Miller,* 199 F. 2d 597 at 599 (9th Cir. 1952) reversing 16 T. C. 1010 (1951); Non-acq. 1951-2 Cum. Bull. 5.)

Conclusion.

The payments made by petitioner, Hans S. Hollander, to his former wife, Idy, during 1948 and 1949 were deductible under Section 23(u) of the Internal Revenue Code of 1939 because such payments were in discharge of a legal obligation arising out of the marital or family relationship, which obligation was imposed upon petitioner under a decree of divorce and under a written instrument incident to the divorce. The Commissioner of Internal Revenue's determination of a deficiency for those years should be disapproved, and the Tax Court's decision reversed, and judgment entered for the petitioner.

Respectfully submitted,

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APPENDIX A.

Internal Revenue Code of 1939.

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * * * * *

(u) Alimony, Etc. Payments—In the case of a husband described in Section 22(k), amounts includible under Section 22(k), in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under Section 22(d) or Section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

Sec. 22. Gross Income.

* * * * * * * * * *

(k) Alimony, Etc., Income—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

No. 15357

In the United States Court of Appeals for the Ninth Circuit

[redacted] HAGGERTY AND CLARENCE BLAKE HAGGERTY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 15357

HANS S. HOLLANDER AND CLEMENCE BLUM HOLLANDER, PETITIONERS

v.

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 43-63) are reported at 26 T.C. 827.

JURISDICTION

The Commissioner determined deficiencies in income tax for the calendar years 1948 and 1949. The notices of such deficiencies were mailed to the taxpayers on September 9, 1953, and the petition for review by the Tax Court was filed on November 30, 1953. (R. 3-13, 90.) Accordingly, the petition was filed within the ninety-day period allowed by Section 272 of the Internal Revenue Code of 1939. An Answer was filed on

behalf of the Commissioner on January 26, 1954. (R. 13-14, 90.) After the hearing, the Tax Court entered its decision on July 18, 1956, determining deficiencies in income tax for the years 1948 and 1949 in the total respective amounts of $6,866.59 and $3,947.58. (R. 63-64, 91.) A petition for review by this Court was filed on October 5, 1956. (R. 64-68, 91.) This Court accordingly has jurisdiction of the case under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Taxpayer[1] and his former wife made an agreement incident to their divorce and providing for the latter's support during her lifetime or until she should remarry, but subsequent to the divorce they made a second agreement which provided for payments for a certain period regardless of her remarriage. The question is whether payments made by the taxpayer under the second agreement and after the remarriage of his former wife can be deducted by him as alimony under Section 23(u) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

The Tax Court adopted the stipulated facts (R. 14-19) and, so far as pertinent here, its findings (R. 45-56) are as follows:

The taxpayer was married to Clemence Blum Hollander (the other petitioner here) on August 5, 1948.

---

[1] Mr. Hollander's second wife is also one of the parties in this case, but since she is involved only because they filed joint tax returns we shall generally refer to the husband as the taxpayer.

(R. 55.) Before then he had married Idy Hollander on September 30, 1937, and has one daughter born of that first marriage on August 12, 1940. In contemplation of divorce an agreement was made by taxpayer and Idy on March 6, 1946. Such agreement stated that it was a permanent and final settlement of property or property rights and obligations for support "which each has or may have or owe to the other or to the minor child". (R. 45.) The provisions which it contained for the support and maintenance of Idy are in part as follows (R. 46-48):

> 2. Upon entry of a valid interlocutory decree of divorce * * * the husband agrees to pay to the wife from and after the entry of said decree * * * an amount equivalent to $10,000.00 per year, payable at the rate of one-twelfth (1/12) of said amount per month, for alimony, support, maintenance and care of the wife and child; provided, however, that if the amount so payable is greater than one-third (⅓) of the income received by the husband for the year concerned, then said yearly amount shall be reduced to an amount equivalent to said one-third (⅓) of said income so received by the husband, which lesser sum shall likewise be payable one-twelfth (1/12) thereof for each month during the year concerned. * * * Any payments under the provisions of this paragraph 2 shall commence immediately following the entry of said decree and shall continue from and after said date for the remainder of the wife's natural life, or until such time as she shall remarry. If the wife shall remarry, then immediately upon the occurrence of said remarriage, payments as set forth

in this paragraph 2 shall automatically cease, but in the event of such remarriage the husband shall continue to pay for the support of the child so long as the child is a minor in an amount which shall be agreed upon by and between the parties hereto, or, if the parties cannot so agree, as determined by Court. In any event, payments provided for in this paragraph and in paragraph 1 hereof shall automatically cease and terminate upon the death of the husband. * * *

* * * * *

9. The husband and wife do hereby release, acquit, and forever discharge the other from any and all claims which he or she now has or may hereafter have against or upon the other for payment of maintenance or ailmony excepting as herein provided. Each of the parties hereto agrees that he or she will not under any circumstances ask any court in any divorce or separate maintenance action or otherwise for any allowance for alimony, support and maintenance or for any decree, judgment or order affecting the property rights of the parties hereto other than as provided and set forth in this agreement.

On June 12, 1946, a decree of divorce was entered by a Nevada court in a suit which had been filed by Idy. The agreement of March 6, 1946, was made a part of the decree and the parties were ordered to comply with it. (R. 48; for decree see R. 49-50.)

The taxpayer did perform his obligations under such decree until the second agreement was entered into in 1948. Also, although custody of the daughter had been

granted to Idy, due to various circumstances she had not kept the child but by mutual agreement the latter had lived with the taxpayer after November 1946. That was still the situation when in 1948 Idy made known to the taxpayer the fact that she wished to remarry and the man whom she wanted to marry was "relatively impecunious". Thus, notwithstanding the provision in the first agreement that the alimony payments thereunder were to cease automatically in the event of Idy's remarriage, taxpayer and Idy made a second agreement on March 16, 1948, in which he promised that after her remarriage he would make payments in the amounts and for the period designated therein. Generally stated, the payments were to be $550 per month from March 1, 1948, until February 1, 1951, and $250 per month from March 1, 1951, until February 1, 1954, when the payments were to cease, but they were to cease earlier if taxpayer died before the end of such period. (R. 48, 50-52; for specific terms of the agreement see Ex. 2-B, R. 31-41.)

It was stipulated that taxpayer "voluntarily entered into the second agreement of March 16, 1948" in order to enable the remarriage of Idy and to obtain legal custody of his daughter. (R. 17, 50.)

Idy remarried on March 29, 1948. She had become a resident of California subsequent to June 12, 1946 (when her divorce decree was entered in Nevada). About May 18, 1948, taxpayer filed a suit against Idy in the Superior Court in Los Angeles County in order to establish the Nevada decree of divorce as a foreign judgment. Idy agreed to the judgment which was entered in that suit on June 30, 1948, and which not only ordered that the Nevada decree be established as a for-

eign judgment but also ordered that such decree be enforced subject to two modifications, namely, (1) that the agreement between the parties of March 16, 1948, be "ratified, confirmed and approved" and that the plaintiff be ordered to make payments pursuant to such property agreement, and (2) that "until the further order of the Court" the plaintiff be given custody of his daughter Barbara Mia with full rights of visitation by her mother. (R. 54-55.)

During 1948 taxpayer made 12 monthly payments of $550 each to his former wife, paid $1,990.40 to the Federal Government on account of her liability for 1947 federal income tax and paid $67 to the State of California on account of her liability for 1947 California income tax.[2] Taxpayer and his second wife claimed the total amount of $8,657.40 as an alimony deduction on their 1948 income tax return. But the Commissioner allowed only $2,057.40 (the sum representing the amounts paid by taxpayer on account of Idy's 1947 liability for federal and California income taxes) and $1,650 (the total of payments made to Idy during the first three months of 1948). The balance of $4,950 claimed by taxpayers for 1948 was disallowed. (R. 55-56.)

During 1949 taxpayer made 12 monthly payments of $550 each to Idy, paid $1,225.44 and $42, respectively, to the Federal Government and the State of California on account of her liability for income taxes for 1948. (R. 56.) Taxpayers claimed the total amount ($7,-

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[2] The 1946 agreement provided for the withholding by petitioner of amounts necessary to pay all income taxes which might be assessed against Idy on account of the payments to be made under the agreement. The 1948 agreement contained a similar provision. (R. 55.)

867.44) as an alimony deduction on their 1949 return, and the Commissioner disallowed the deduction.

The Tax Court approved the Commissioner's determination and found deficiencies in income tax for the years 1948 and 1949 in the respective amounts of $6,866.59 and $3,947.58. (R. 63-64.)

SUMMARY OF ARGUMENT

Payments made by a taxpayer for the support of his divorced wife are deductible on his income tax return if such payments are periodic and have been made in discharge of a legal obligation which, because of the marital or family relationship, has been imposed upon, or incurred by, him under a decree or under a written instrument incident to the divorce. The Tax Court correctly held that these requirements were not met by the taxpayer here.

The payments here were made to taxpayer's divorced wife under their second agreement which, unlike the first agreement, provided for payments to the wife for six years and regardless of whether she should remarry. However, she did remarry shortly after execution of the second agreement, and it has been stipulated that her desire to remarry and to have additional support payments because she wished to marry a "relatively impecunious" man were the basic reasons for the second agreement. Thus the Tax Court properly held that such agreement was not incident to the divorce, as required by the statute, but was incident to the wife's remarriage. The Tax Court also correctly pointed out that the second agreement provided for payments for which there was and could be no obligation under the first agreement since payments automatically ceased under that agreement when the wife remarried. The parties

had intended such arrangement to be a final property settlement and included a statement to that effect in the first agreement which was incorporated in the Nevada divorce decree. Consequently, in making the second agreement in order to enable the wife to remarry, th parties were not merely reshuffling or readjusting the obligation originally imposed for the wife's support but were providing for a new non-support obligation and were acting so that the wife could acquire a new status.

Taxpayer's major contention is that the second agreement should be treated as being incident to the divorce because the first agreement was incident to the divorce. But that is not so here because, as already indicated, the obligation in the second agreement was not imposed by (or a revision of) the first, and the payments thereunder did not discharge any support obligation within the meaning of the applicable statutory provisions. Moreover, the cases cited by the taxpayer did not announce as a general principle that any subsequent agreement must be treated as incident to a divorce if the original agreement is incident to the divorce, and all of the cases relied on are distinguishable on their facts.

The crucial and undisputed fact here, which completely distinguishes this case from those relied upon by taxpayer, is that the legal *obligation to support* incurred by him under the original pre-divorce agreement was, by the very terms of that agreement, to *terminate* upon the happening of a specified contingency—the wife's remarriage. By purporting to obligate himself in the post-divorce "revisionary" agreement to continue to support the wife subsequent to and

notwithstanding her remarriage, taxpayer gratuitously undertook to *revive* a support obligation of which he had already expressly relieved himself by a valid and final pre-divorce settlement agreement with the wife. To permit the husband in the guise of post-divorce alimony revisionary agreements to deduct such voluntary support payments would defeat the legislative intent, apparent from the language and history of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939, to confine the deduction to support payments made "in discharge of a legal obligation" imposed upon the husband.

ARGUMENT

The Tax Court Correctly Held That the Taxpayer Is Not Entitled to Deduct Payments Made to His Divorced Wife Under Their Agreement Entered Into Subsequent to the Divorce

The taxpayer here claims the right to deduct the payments which he made to his divorced wife during 1948 and 1949 after execution of their agreement on March 16, 1948. It is conceded that if these payments are deductible it is because of the privilege granted by Section 23(u) of the Internal Revenue Code of 1939 (Appendix, *infra*) which provides, in substance, that deductions may be taken by a divorced husband under the conditions set forth in Code Section 22 (k) (Appendix, *infra*), and that such deductions may equal amounts which are includible under the latter section in the gross income of the divorced wife. Pertinent provisions of Section 22 (k) are as follows:

> In the case of a wife who is divorced * * * from her husband under a decree of divorce * * * periodic payments * * * received subsequent to such decree * * * in discharge of, a legal obligation

> which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

It will be seen that in order for the payments made by a divorced husband to come within the provisions of Section 22 (k) he must show, among other things, that such payments have been made in discharge of a legal obligation which, because of the marital or family relationship, has been imposed upon, or incurred by, him under a decree or under a written instrument executed incident to the divorce. The Commissioner determined that these requirements had not been met by the taxpayer here and the Tax Court agreed. Thus it held that the payments here are not within the contemplation of Section 22(k) and therefore are not deductible under Section 23 (u).

A. *The payments here were not made under an agreement executed incident to the divorce as required by the statute*

The payments involved here were made by the taxpayer to Idy, his divorced wife, under their second agreement executed on March 16, 1948, which was only 13 days before her remarriage. (R. 17-18.) The Tax Court found (R. 62) that such agreement was not incident to their divorce, as required by Section 22 (k), but was incident to Idy's remarriage. That finding is amply supported by the terms of the agreement and

the facts leading up to its execution. Moreover, such finding is a proper basis for the Tax Court's conclusion that payments under the second agreement did not come within the purpose or intent of the first agreement of March 6, 1946, which was incorporated as a part of the divorce decree entered on June 12, 1946, and was incident to the divorce. (R. 17, 48-51, 62.)

In reaching that conclusion the Tax Court pointed out (R. 61) that under the second agreement taxpayer agreed to make payments to his former wife *for which there was and could be no obligation under the first agreement.* The correctness of the Tax Court's statement cannot be denied. Under the first agreement payments for Idy's support (as designated therein) were to continue for the remainder of her natural life or "until such time as she shall remarry", and if she "shall remarry, then immediately upon the occurrence of said remarriage" the payments for her support "shall automatically cease". (R. 23.) That this arrangement was intended to be a final settlement is specifically indicated in paragraph 9 of the agreement providing that both parties "do hereby release, acquit, and forever discharge the other from any and all claims" for payment "of maintenance or alimony" except as allowed therein and that each agreed not to ask any court "under any circumstances" for any allowance for support except as provided in the agreement. (R. 28.)

It is also evident that the Nevada court which granted the divorce treated the first agreement as a final settlement of Idy's right to support. The divorce decree states (R. 49-50) that jurisdiction is being re-

tained only for the purpose of making any further order which might be necessary for the custody of the daughter and there is no contention here that any attempt has ever been made or could have been made successfully to change the Nevada decree.[3] Thus the divorce decree must be accepted as rendered and it not only states that the agreement of March 6, 1946, "is hereby ratified, confirmed and approved by this Court and made a part of this decree", but also orders that "the parties hereto comply with all the requirements contained in the above-mentioned property settlement agreement". (R. 49.)

Notwithstanding the terms of the divorce decree and the agreement incorporated therein, the taxpayer and Idy made a second agreement about two years later in which he promised to make monthly payments until February 1954 to the extent designated therein and even though Idy did remarry. (R. 32-41.) But in taking such action they were not merely reshuffling the original divorce arrangements, as taxpayer argues here. Instead, the second agreement imposed a new obligation on the taxpayer and was entered into not for the purpose of carrying on the divorce status but

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[3] On June 30, 1948, an order which established the Nevada divorce decree as a foreign judgment was entered by a California court in a suit filed by taxpayer against his divorced wife. The latter did not enter an appearance and there is nothing to indicate that there was any controversy on which such suit could be based. Certainly the order is open to question for, although it purported to approve the Nevada decree, it did not in fact do so. Instead, it ordered that such decree "be enforced in this action subject to modifications" of the second agreement. (R. 43.) In doing this the California court was exceeding its authority if it was attempting to modify the Nevada decree and apparently taxpayer agrees, for he does not seem to rely here on the order of the California court and we submit that it has no materiality in determining the issue here.

to enable Idy to cast off that status. That this is so is shown both by the stipulation of facts and by the provisions of the second agreement.

The parties here have stipulated that, subsequent to the divorce, Idy made known to the taxpayer that "she desired to remarry"; that the person whom she desired to marry was "relatively impecunious"; that under the first agreement taxpayer "would be relieved of further alimony obligations" upon her remarriage; and that "In order to enable the remarriage of Idy" and to obtain legal custody of his daughter, taxpayer "voluntarily entered into the second agreement of March 16, 1948". (R. 16-17.) These stipulated facts are in effect an admission that taxpayer understood that his legal obligation for support was not a continuing one, i.e., was not to survive Idy's remarriage, and that he had *voluntarily* agreed to help Idy so that she could get married again. This is also shown by the provisions of the second agreement, which pointed out in clear and unmistakable language that the reason for entering into the agreement was that Idy desired to remarry and wished that taxpayer's payments to her be continued, and that the taxpayer was willing to make payments for the number of years and amounts designated therein. (R. 32-33.)

We submit that in view of the provisions in the second agreement just referred to and other facts relevant thereto the Tax Court correctly held that such agreement was not incident to the divorce, and that the payments thereunder have not been made in discharge of a legal obligation which, because of the marital relationship, was imposed on the taxpayer.

B. *Errors in taxpayer's argument*

The taxpayer's principal contention is that the second agreement was incident to the divorce because it was merely a revision of the first agreement which was incident to the divorce. We do not of course agree that the second agreement was merely a revision of the first and neither did the Tax Court. Even the taxpayer appears to concede that the second agreement was incident to Idy's remarriage or at least admits (Br. 17) that her contemplated remarriage was the motive for that agreement. However, the taxpayer asserts that the Tax Court was in error in centering its attention on Idy's remarriage and should have given more consideration to the question of whether the second agreement modified the first one. Thus taxpayer argues (Br. 16-18) that the Tax Court misconstrued the issue to be determined here and also failed to take the required realistic approach. But we submit it is the taxpayer who is in error. The Tax Court carefully analyzed both agreements and not only recognized that the question to be determined was whether the second one was merely a modifying agreement but answered that question. Its answer was that, since there was no continuing obligation for support under the first agreement and taxpayer's obligation ended with Idy's remarriage, the second agreement was not a modification or revision of any obligation imposed by the first. Moreover, it held that that was true regardless of certain language indicating that the parties were thereby settling taxpayer's obligation to support imposed by the first agreement. Such language may have been inserted to strengthen the taxpayer's position for income tax purposes but, whether or not that was its purpose, the Tax

Court correctly construed the second agreement and held that it was not in fact a revision of the first but that it imposed a new obligation. As to this the Tax Court said (R. 61-62):

> Although the second agreement contained words to the effect that it was in settlement of petitioner's obligations for alimony under the first agreement, there could under the first agreement be no liability for the payments here in question. The decree of divorce and the 1946 agreement incorporated therein had specified with particularity that petitioner should have no obligation to support Idy after her remarriage. The 1948 agreement, however, is bottomed on her contemplated remarriage and to a man apparently incapable of supporting her in keeping with her tastes or desires. It thus appears, we think, that the second agreement was not incident to the divorce of petitioner and Idy, but incident to Idy's remarriage, and the payments made thereunder were not only not within the purpose or intent of the first agreement but petitioner's non-liability for such payments, to borrow from the words of the agreement, had been permanently and finally settled.

It is also obvious that the Tax Court did not give undue emphasis to Idy's proposed remarriage. Since that was the admitted motive for the second agreement the Tax Court was required to consider it, and the weight which it gave to Idy's remarriage is merely the result of a realistic approach, which taxpayer contends should be made.

In other words, in analyzing the situation here the

Tax Court considered these facts: The taxpayer's former wife wanted to marry a man whom she thought was financially unable to support her as she wished to be supported; she knew that under their agreement she could not require the taxpayer to help support her when she became another man's wife; nevertheless she appealed to the taxpayer to do something for her over and above what he had agreed to do and he was generous enough to help her by promising to make payments for six years under certain conditions set out in the second agreement. (R. 31-41.) Thus, viewing the situation realistically, the Tax Court properly concluded that the second agreement was not entered into in furtherance of their divorce but was entered into to help Idy change her status from that of a divorced woman to that of a married woman.

We are of course aware, as taxpayer points out (Br. 23), that Idy had not remarried on March 16, 1948. But she was married 13 days later, and there is no basis for assuming that she would have given up the lifetime payments and other benefits under the first agreement (R. 19-31) if she had not had definite plans for an early remarriage. Certainly both taxpayer and Idy intended that this new agreement should cover the first years of her remarriage and such agreement was in fact incident to that event. Consequently taxpayer is the one who is not being realistic when he asserts (Br. 22) that it is material that when the second agreement was executed he had not yet been relieved of his obligation under the first agreement and that such obligation was a continuing one. As we have pointed out, taxpayer's obligation could continue only to the time of Idy's remarriage, and the reason he was willing to make another agreement was that he knew of her plans to remarry.

Thus, because of the new status which Idy intended to, and did, acquire within 13 days, taxpayer knew his *obligation to support her* was ending. And, as the Tax Court stated (R. 62), there is nothing in the record here to show that Idy would not have remarried if the taxpayer had not made the second agreement. Consequently, what the taxpayer did was to assume a new non-support obligation under an agreement with a purpose and terms different from those of the first agreement.

As the Tax Court also pointed out (R. 62), prior to the 1948 agreement taxpayer had already obtained custody of their daughter by mutual agreement and that arrangement was merely formalized by the 1948 agreement. But, even if Idy's promise to allow the taxpayer to have custody of the daughter should be treated as consideration for the agreement, it is still evident that the payments under this second agreement were not for the *support* of a divorced wife within the purview of Sections 22(k) and 23(u).

C. *The cases taxpayer relies on are distinguishable*

Taxpayer cites (Br. 11) a number of cases in support of its major contention that an agreement is incident to divorce if it modifies an agreement which is incident to the divorce. But the facts in the cases relied on are distinguishable from those here.

In *Newton* v. *Pedrick,* 212 F. 2d 357 (C.A. 2d), which appears to be the case primarily relied on, the original agreement, which was incident to the divorce, required the taxpayer to make payments to his former wife of $24,000 annually for life or until her remarriage and of $14,000 annually after her remarriage. Thus the

taxpayer had a continuing obligation to make payments even after her remarriage, which was not true here. Consequently, when the parties in the *Newton* case made another agreement some years after the wife's remarriage and provided for an $11,000 increase in annual payments, there was and could be no question as to whether the taxpayer's obligation was affected in any way by the remarriage of his former wife. As the Second Circuit properly held, the last agreement in that case was incident to the divorce because it had merely modified the original agreement which was incident to the divorce. But, in reaching that conclusion, the court said (p. 361):

> We hold no more than that where a legal obligation to support survives the dissolution of the marital relationship—whether because of imposition in the divorce decree itself, or because of a pre-decree agreement not incorporated in the decree * * * a subsequent adjustment of that obligation by a court order or by later agreement, as the case may be, is "incident to such divorce" within the purview of the statute.

We submit that in making the above statement the Second Circuit plainly indicated that, to be incident to a divorce, a second agreement which is subsequent to the divorce must be merely an adjustment of an obligation which has survived the divorce. In the instant case the second agreement was not a mere adjustment because the only obligation which had been imposed on the taxpayer by the divorce decree and the first agreement was one to support the former wife so long as she remained unmarried. Consequently, when

taxpayer promised in the second agreement to go beyond that he assumed a new obligation.

Another case relied on by taxpayer is *Smith* v. *Commissioner,* 192 F. 2d 841 (C.A. 1st). In that case the parties entered into an agreement in 1937 which provided for support payments to be made to the taxpayer for her lifetime or until she remarried and there was also provision for modification of the agreement after the happening of certain events. Later in 1944, after taxpayer's former husband failed to make the payments and he asked the divorce court for a modification of the alimony payments, the parties compromised their differences by making another agreement in which the taxpayer agreed to accept the payments provided for therein in lieu of the payments under the first agreement. The First Circuit, affirming the Tax Court, held that the 1944 agreement was a revision of the first and that it was incident to the divorce because the first one had been so construed. Thus it held that the taxpayer was taxable on the sums received thereunder. Inasmuch as the taxpayer here asserts (Br. 19-20) that the Tax Court has not properly interpreted the *Smith* case and has relied on "dictum", we call attention to the actual basis for the First Circuit's decision. It said (p. 844):

> The criticisms of the petitioner as to the findings of fact by the Tax Court are without merit. Her arguments appear unduly technical and unrealistic in the circumstances here. The 1937 agreement clearly indicates that it was not regarded by either party as final and that subsequent changes were contemplated. The finding that the 1944 agreement was "supplemental" and a "revision" of the

> 1937 agreement was on the facts here a proper characterization. The 1944 agreement did cancel the 1937 agreement but that is not conclusive. It merely indicates that the parties reappraised their positions and altered circumstances and then agreed to different and changed terms. The genesis of the 1937 and 1944 agreements were the same —a satisfaction by the husband of his marital obligation which continued after the divorce. It follows, therefore, that since the 1937 agreement was incident to the divorce decree, being specifically mentioned therein, that the 1944 agreement was also incident thereto. In fact, the decree of January 14, 1946 specifically mentions the September 1, 1944 agreement.

From the above quotation it is evident that the taxpayer there, who had not remarried, had at all times a right to payments for her support after dissolution of the marriage. Thus the husband's obligation in that case was a continuing one and his payments to his former wife were under an agreement entered into incident to the divorce. The situation here is obviously different.

In two other cases cited by the taxpayer (*Grant* v. *Commissioner,* 209 F. 2d 430 (C.A. 2d), and *Holahan* v. *Commissioner,* 222 F. 2d 82 (C.A. 2d)) the primary question was whether a taxpayer must treat a lump-sum support payment, which was made by her divorced husband under an agreement entered into subsequent to the divorce, as a periodic taxable payment under Section 22 (k) ; and the Second Circuit held in both cases that the wives must do so because these lump-sum payments represented the payments of ali-

mony arrears which the divorced husbands had failed to make under the original agreements, which were incident to the divorces. But in the instant case there is no such lump-sum payment involved and no payments in discharge of the obligation imposed under the original agreement, as was true in the *Holahan* and *Grant* cases.

The circumstances here are also clearly different from those in *Walsh* v. *Westover* (S.D. Cal.), decided March 23, 1953 (1953-1 U.S.T.C., par. 9283), in which support payments for the taxpayer's divorced wife were twice reduced by agreements entered into some years after the entry of the divorce decree and execution of the original agreement, which provided for weekly payments with no condition attached except that the wife must support the two minor children. As the District Court found that the original agreement there was incident to the divorce it also reached the same conclusion as to the two subsequent agreements, which had merely reduced the amounts previously allowed. Thus it held that the taxpayer could deduct the payments involved there under Section 23(k), but the opposite conclusion was reached in an earlier case brought by the taxpayer's wife. *Commissioner* v. *Walsh,* 183 F. 2d 803 (C.A.D.C.). See also *Commissioner* v. *Murray,* 174 F. 2d 816 (C.A. 2d).

We are aware that since the Court of Appeals for the District of Columbia decided the *Walsh* case several courts have taken a more liberal view of the term "incident to divorce" and have held that such term does not have to be interpreted as if it read incident to a divorce decree. See *Commissioner* v. *Miller,* 199 F. 2d 597 (C.A. 9th), and *Feinberg* v. *Commissioner,* 198

F. 2d 260 (C.A. 3d). But it should be noted that although a more liberal view is now generally approved, the Third Circuit indicated in the *Feinberg* case (p. 263), as it had earlier in *Cox* v. *Commissioner,* 176 F. 2d 226, 229, that to be incident to divorce an agreement should be a "part of the package of the divorce". The facts in the *Cox* case are of course different from those here since there was only one agreement in that case and it was entered into after the divorce, when the divorced wife threatened to take action against the husband because of his remarriage. But we call attention to the *Cox* case because, in holding against the husband there, the Third Circuit made it clear that, when, as in that case, an agreement is "independent and anchor-free of the divorce" (p. 230) and has been entered into to preserve a taxpayer's divorced status as to his former wife and his married status as to his second wife, it is not incident to the divorce although it may refer to such divorce. We submit that a somewhat similar situation existed here in that the second agreement was not a part of the "package of the divorce" but was independent of it and was entered into in order to enable the taxpayer's wife to acquire the status of a married woman after the dissolution of her first marriage by divorce. Consequently it is clear that the payments here were not in discharge of an obligation imposed by an agreement which was incident to the divorce.

CONCLUSION

The Tax Court's decision is correct and should be affirmed.

Respectfully submitted,

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MARCH, 1957.

APPENDIX

Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

* * * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an

obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered period payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. * * *

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(26 U.S.C. 1952 ed., Sec. 22.)

Sec. 23. Deductions From Gross Income.

* * * * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*— In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section

22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

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